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HENRY A.

ON WRIT OF [illegible] TO THE UNITED STATES CIRCUIT COURT OF [illegible]

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 275

D. T. CURRIN, S. M. CUTTS, AND H. A. AVERETT, DOING BUSINESS AS FLEMING WAREHOUSE, OXFORD, NORTH CAROLINA, ET AL., PETITIONERS

v.

HENRY A. WALLACE, SECRETARY OF AGRICULTURE FOR THE UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court on the granting of preliminary injunction appears in the record at R. 31–43. The opinion of the District Court on the granting of permanent injunction is reported in 19 F. Supp. 211, and appears in the record at R. 95–110. The opinion of the Circuit Court of Appeals is reported in 95 F. (2d) 856, and appears in the record at R. 383–401.

JURISDICTION

Jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. The decree of the Circuit Court of Appeals was rendered on April 5, 1938 (R. 401–402). On June 30, 1938, the time within which to apply for writ of certiorari was extended to September 1, 1938, by order of Mr. Justice McReynolds (R. 403). Petition for certiorari was filed August 15, 1938, and was granted October 10, 1938. The United States did not oppose the granting of the writ, in view of the importance of the constitutional questions involved.

QUESTIONS PRESENTED

1. Whether the Act of Congress, approved August 23, 1935, known as The Tobacco Inspection Act (c. 623, 49 Stat. 731), is a constitutional and valid exercise of the power of Congress to regulate interstate and foreign commerce, or other powers of Congress.

2. Whether said Act provides for an unconstitutional delegation by Congress of its legislative powers.

3. Whether said Act deprives the petitioners of property in violation of the Fifth Amendment to the Constitution of the United States.

4. Whether in the circumstances disclosed by the record the petitioners are entitled to attack the constitutionality of the Act, or to equitable relief.

5. Whether in the circumstances disclosed by the record the petitioners are entitled to a declaratory judgment.

STATUTE INVOLVED

The statute here challenged is the Tobacco Inspection Act, approved August 23, 1935 (c. 623, 49 Stat. 731; 7 U. S. C., Supp. III, 511a–511q). It is set out in full at R. 19. It provides, in summary, for the inspection and grading, by Government graders, before sale, of tobacco offered for sale by warehousemen as tobacco auctioneers. The great preponderance of all tobacco produced in the United States is sold in this manner. The Act provides for designation by the Secretary of Agriculture of the markets where tobacco bought and sold, or the products thereof, move in interstate commerce and make the Act applicable to the markets so designated subject to the following two exceptions: Before the Secretary may designate a market as subject to the provisions of the Act, he is required to conduct a referendum among the growers who sold tobacco on that market during the preceding marketing year. No market may be designated unless two-thirds of such growers voting favor the establishment of the inspection service. Furthermore, if sufficient inspectors are not available, or if for other reasons the Secretary is unable to provide for inspection and grading of tobacco at all markets within an area, he is required to designate first those markets where the greatest number

of growers may be served with available facilities. The Act provides for public notice that a market has been designated by the Secretary and provides that after thirty days following such notice no tobacco shall be offered for sale at any market so designated until the tobacco shall have been inspected and its grade certified by the Secretary's representative. It makes violation of the latter provision a misdemeanor and provides for a fine or imprisonment or both in case of a violation. The Act provides also for inspection of tobacco by Government inspectors, for a fee, on the request of owners of the tobacco or others financially interested in it.

STATEMENT

(a) *History of the case*

The Act was approved August 23, 1935. Regulations were prescribed, effective January 2, 1936 (R. 191). On August 7, 1936, the official standard grades for flue-cured tobacco were prescribed pursuant to Section 3 of the Act (R. 203–218). On August 26, 1936, pursuant to Section 5 of the Act, the Secretary of Agriculture designated the market upon which the warehouses operated by the petitioners are located (R. 200–202). On October 24, 1936, the petitioners filed their bill in the District Court of the United States for the Eastern District of North Carolina, seeking to have the Act declared unconstitutional and to enjoin its application to their warehouses (R. 1–17).

The District Court granted a temporary restraining order on November 5, 1936 (R. 31–43) and, after hearing, issued a permanent injunction on April 24, 1937 (R. 110–112).

The Circuit Court of Appeals reversed, holding (1) that although the petitioners had failed to show that substantial damage would fall upon them through compliance with the Act, they were entitled nevertheless to maintain the suit and, if the court were of the opinion that the Act is unconstitutional, to injunctive relief; (2) that the Act is a proper exercise of the power of Congress to regulate interstate commerce and is not an invasion of the reserved powers of the States; (3) that there was no unlawful delegation of power either to the Secretary of Agriculture or to the growers; and (4) that the Act does not deprive the petitioners of property without due process of law (R. 383–401).

By the present writ of certiorari, petitioners seek reversal of this decision of the Circuit Court of Appeals.[1]

The pleadings and evidence before the District Court and the Court of Appeals disclosed the following facts:

---

[1] The case was finally decided by the District Court (April 24, 1937, R. 110), and appeal to the Circuit Court of Appeals perfected (June–July 1937, R. 379, 382), prior to the enactment of the Act of Congress of August 24, 1937 (c. 754, 50 Stat. 752; 28 U. S. C., Supp. III, 401, 349a. 380a), providing for three judge District Courts and direct appeal to this Court in cases like the present one.

(b) *Interstate and foreign commerce in tobacco sold on the Oxford market*

More than one-third of the total annual domestic production of tobacco in the United States is grown in North Carolina (R. 76, 134, 137). In 1935 about 79% of the flue-cured tobacco produced in North Carolina was exported to foreign countries or used in manufacturing operations in other states. The remaining 21% of the North Carolina tobacco was used in manufacturing operations within the State (R. 76). The tobacco was marketed on forty auction markets within the State. Three of these, Oxford, Goldsboro, and Farmville were designated in 1936 for compulsory grading and inspection under the Tobacco Inspection Act (R. 66, 67). As the Act anticipated, the personnel available for grading service could not cover all of the North Carolina markets (R. 64). These three markets were designated by the Secretary because voluntary inspection service had previously been in operation on them and the growers were familiar with the benefits of such inspection.[2]

Over two million pounds of flue-cured tobacco were sold on the Oxford tobacco market during the

[2] Voluntary inspection was first provided for in the United States Warehouse Act (Act of August 11, 1916, c. 313, 39 Stat. 486, 7 U. S. C. 241–273). Thereafter, the annual Agricultural Appropriation Acts provided funds for "Market Inspection of Farm Products," including, in 1930, and thereafter, appropriations for the inspection of tobacco.

week of October 29, 1936, the last full week before the temporary injunction was issued in this case. The major part of this tobacco had been grown in North Carolina, but a substantial part of it had come from Virginia farms (R. 76, 98). The chief purchasers of the tobacco sold on the Oxford market during that week and the amounts purchased by each were (R. 77):

Company	Pounds	Percentage of total
R. J. Reynolds Tobacco Company	322,806	15.3
American Tobacco Company	85,118	4.0
Liggett & Meyers	256,306	12.2
Adams Tobacco Company	467,023	22.2
Penn Tobacco Company	102,610	4.9
Export Leaf Tobacco Company	251,598	11.9
Imperial Tobacco Company	492,266	23.4
Total[1]	1,977,637	93.9

[1] These were only the "principal purchasers." Presumably the difference between the total poundage listed in the table and the 2,105,305 pounds sold (and the difference between 93.9 percent and 100 percent of the total sales) represents purchases by buyers other than those listed. The record indicates that, aside from the three companies first listed above, only one small company manufactures tobacco products in North Carolina (R. 77).

Only the first three of these purchasers are manufacturers of tobacco products (R. 77). The other four are engaged principally in the foreign export trade (R. 69). The R. J. Reynolds Tobacco Company has its factory at Winston-Salem, North Carolina, and all of the tobacco purchased by that company on the Oxford market is manufactured into tobacco products in North Carolina (R. 77). Both the American Tobacco Company and Liggett & Myers have factories both in North Carolina and in other States (R. 77). Accordingly, only about 15% of the tobacco sold on the market for that week

was definitely destined for manufacture in North Carolina (R. 77). The remaining 77% purchased by these companies was destined to be exported or to be manufactured into tobacco products partially in North Carolina and partially in other States (R. 77). Approximately 62% of it moved directly into foreign commerce (R. 69, 77).

(c) *Method of operation of the auction markets*

The buyers on this market are agents for the large tobacco companies (R. 69, 77). The tobacco warehousemen auction the tobacco. They are supposed to represent the growers and they receive fees from the growers at rates fixed by North Carolina laws.[3]

When tobacco is ready for the market, the grower grades it as best he can, arranges it in bundles or "hands," and hauls it to the auction warehouse (R. 71). There it is placed in baskets, and weighed by a warehouse employee (R. 71). The baskets are then arranged in rows on the warehouse floor and a ticket is placed on each pile (R. 71). When the sale begins the auctioneer proceeds along one side of a row of tobacco baskets, while the buy-

[3] The scale of fees shown by the record are:
Ten cents per hundred pounds as a weighing fee, fifteen cents per hundred pounds as an auctioneer's fee, and 2½% of the money received from each sale (R. 67, 68).

ers move with the sale along the other side (R. 71). Once the sale has started it proceeds with lightning-like speed. On the Oxford market the minimum speed allowed is 360 baskets per hour—one basket every 10 seconds (R. 71). Sales are conducted as fast as 525 baskets per hour, a rate of approximately a basket every 6 seconds. The sale is in constant motion. As the sale moves along the rows the buyers can pull samples from the piles, but frequently the sale moves so rapidly that they are unable to get close enough to pull a sample and examine it (R. 72). Often it is difficult even to tell which pile is being sold (R. 71, 72). The auctioneer intones the bids and offers so rapidly that his words constitute a jargon which can be understood only by one familiar with the auction system of marketing tobacco (R. 72). The offer is usually made by a motion of the head, a movement of the hand, a wink of the eye, or some other gesture known only to the auctioneer and the bidder (R. 72).

As soon as a sale is made, a ticket marker places the name of the buyer, the price, and the buyer's grade on the ticket (R. 71). The tobacco is then removed by the buyer from the warehouse floor, unless, before it is removed, the grower-seller has rejected the offer (R. 72). This can be done only by a grower present at the sale (R. 68).

(d) *Effect of haphazard grading*

Because of the speed at which the sale is conducted, few buyers have the opportunity to make a satisfactory examination of the tobacco being sold. Consequently they make many errors. This fact, coupled with the grower's lack of accurate knowledge of the grade of his tobacco and the current prices, results in extreme and haphazard uncertainty in the prices which a grower may receive for tobacco of any particular grade.

In one week, one of the companies buying tobacco on the Oxford market paid prices varying from $1 to $6 per 100 pounds for the same grade of leaf. For another grade, the price varied from $18 to $32 per 100 pounds. Still another grade showed a variation of $19 per 100 pounds (R. 75). In another case tobacco was sold at 8 cents per pound at the auction sale; the owner rejected the bid and removed his tobacco to another row ahead of the sale. When the sale reached this basket half an hour later the identical tobacco brought 20 cents per pound, an increase of 150% (R. 84, 122). In other instances, growers following a similar procedure received prices 300 to 400% higher than that originally bid (R. 85, 122).

The individual grower suffers by any error which tends to produce a low price for his crop. The company, on the other hand, is not injured by paying too high a price for a particular basket of tobacco. It purchases large quantities and evens

up on those lots purchased below the average price (R. 75). Furthermore, the cost of the tobacco in tobacco products is very small in relation to the price received for such products by those who buy tobacco on auction markets and manufacture it.

(e) *The effect of the statute upon operation of the market*

The Act does not change the mode of operation of any auction warehouse on a designated market and requires no affirmative action by the warehousemen. It merely requires them to permit the Government inspectors to come upon the floor of the warehouse shortly before the sale, examine samples of tobacco from the various baskets, and mark the Government grade on the ticket already affixed to the pile of tobacco (R. 72). The statute obligates the warehouseman to have the tickets so printed that a space shall be left in which the grade may be marked and also requires that an extra carbon copy of the ticket be printed (R. 88, 92, Defendants' Exhibit No. 2, R. 115). The additional cost of these requirements is negligible.

The record shows that the inspection of tobacco by the Government inspectors is conducted in a neat and orderly manner, and that the piles of tobacco are not disturbed nor the appearance of the tobacco injured (R. 68, 73, 81, 82, 85). The record shows that the Government inspectors sometimes assist growers in improving the appearance of their tobacco (R. 84, 85).

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(f) *Effect of information furnished growers under the Act*

The Act authorizes the Secretary to collect and publish timely information on the market prices for tobacco. Accordingly the Secretary has caused to be displayed daily in each warehouse on the Oxford market a detailed report indicating the average *prices* paid for the various Government grades of tobacco during the previous week (R. 73). The certification of grade following the inspection informs both the grower and the buyer of the *grade* of each lot of tobacco offered for sale. The Act thus gives the parties to the sale accurate and complete information as a basis for judging the fairness of any bid made for a basket of tobacco (R. 84, 85–87). Knowledge of both grade and current prices is obviously essential to an informed judgment. Before this Act was passed lack of such information left the grower in the dark as to the real value of his tobacco, inasmuch as the buyers keep the private grading systems which they use strictly confidential. This lack of knowledge on the part of the grower resulted in unreasonable fluctuations in the prices paid for identical grades and in the sale of much tobacco at far less than its actual value (R. 75, See House of Representatives Report, Appendix, p. 95; Defendants' Exhibit #3, R. 119–122; Defendants' Exhibit #4, R. 140–142, 180–182, 186–187). The Tobacco Inspection Act is designed to remedy these conditions by making

available to growers, as well as buyers, accurate information as to prevalent prices, and as to the grade of each lot of tobacco offered for sale. With such information the grower is able to decide intelligently whether to accept or reject any bid and the haphazard conditions described above are minimized.

SUMMARY OF ARGUMENT

Sales of tobacco for interstate and foreign shipment as conducted on auction warehouse markets are transactions in interstate and foreign commerce and are subject to Federal regulation. The requirement of this Act that tobacco sold at auction sales be graded according to standards established by the Federal Government is a valid exercise of the power to regulate such sales. The provision for inspection and certification of such tobacco prior to sale is likewise a valid exercise of the Federal power to regulate interstate and foreign commerce, as is the requirement that tobacco sold at such warehouses for interstate shipment, which is indistinguishable, until after the sale, from tobacco sold for interstate or foreign shipment, be also inspected and certified.

Furthermore, the provision for inspection and certification of tobacco sold on auction warehouse markets is a valid exercise of the power of Congress to fix the standard of measures and the power to procure information necessary to the effective exercise of the powers specifically granted to Congress.

These powers sustain the inspection of tobacco in the warehouses irrespective of whether it has then entered interstate commerce. These powers and the power to regulate interstate and foreign commerce exercised together in this Act sustain both the inspection and the prohibition of sale, at auction markets, of ungraded tobacco.

The provision requiring the Secretary of Agriculture to designate for inspection first the markets on which, with available facilities, inspection may be provided for the greatest number of growers does not involve delegation of legislative power to the Secretary of Agriculture. The standards to guide the Secretary in the selection of markets are clear and definite. Moreover, if this Act can be construed as delegating legislative power, under the doctrine of delegation as now applied, that doctrine should be reconsidered and limited to a scope consistent with the history of our constitutional development and with the practical effectiveness of democratic government.

The provision that inspection shall not be required on a market otherwise qualified if a specified proportion of the growers object in a referendum required by the Act does not delegate legislative power to the growers.

The petitioners have shown no property interest which is adversely affected or threatened with injury by the Act. Nor have they shown that even any expectancy of future gain is prejudiced by its operation. Accordingly, they have failed to show

that this Act injures them or threatens to deprive them of property. Having failed to show that they are injured by the Act, they cannot be said to be deprived by it of either constitutional rights or property. Moreover, the provision of the Act to which petitioners object as discriminatory, although they provide for application of the Act at some places and not at others, are thoroughly reasonable, are not discriminatory in the constitutional sense, and do not infringe the due process clause of the Fifth Amendment.

The petitioners have failed to show any threat of irreparable injury as the basis for the granting of equitable relief and have failed to show the existence of a justiciable controversy as a basis for a judgment under the Declaratory Judgments Act.

ARGUMENT

I

THE TOBACCO INSPECTION ACT IS A VALID EXERCISE OF THE FEDERAL POWER TO REGULATE INTERSTATE AND FOREIGN COMMERCE

The petitioners say that the thing sought to be regulated is the auction method of selling tobacco (Pet. Brief, p. 26). That is correct. The Act requires that tobacco shall not be sold at auction warehouses unless the persons buying and selling tobacco at such warehouses are informed of the grade and current prices of the tobacco in such manner as Congress has found necessary to assure

that the selling will be fairly conducted and free from the evils found disruptive of interstate commerce in tobacco.[4]

The petitioners claim that they offer tobacco for sale as the agent of the grower in such sales (Petitioner's Brief, p. 23), yet here they object to the provision made for giving information to the persons for whom they claim they are agents. The furnishing of such information imposes no burden on them and they neglect to make apparent any reason why any agent should object to his principal being informed of the value of the commodity which the agent sells for him.

Whatever may be the motive, the petitioners assert only technical objections. First, they say that tobacco auction sales are not a part of interstate commerce and that therefore the requirement cannot be made by the Federal Government; and, second, that since the determination of the grade must be made before the sale to make the regulation effective, it amounts to a regulation of intra-

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[4] Whatever amounts to more or less constant practice, and threatens to obstruct or unduly burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This Court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent. *Stafford v. Wallace*, 258 U. S. 495, 521. See also *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 37.

state commerce and cannot be required by the Federal Government. They say further that because the requirement applies to the relatively small quantity of tobacco sold for intrastate shipment as well as to that sold for interstate and foreign shipment, the Act is not a valid exercise of the commerce power. These objections are without merit. They will be considered in the order in which they have been stated.

Tobacco auction sales as conducted by the petitioners are clearly transactions in interstate commerce. The evidence is clear that the large majority of the tobacco sold through the petitioners' warehouses is sold for immediate interstate or foreign shipment.[5] Apparently the petitioners' contention that such sales are not subject to Federal regulation is based upon the view that because the greater part of the tobacco sold on the Oxford market is produced in North Carolina the transactions by which it is sold are not a part of inter-

[5] A substantial proportion of the tobacco sold on the Oxford market is grown in Virginia. The sale of such tobacco is clearly interstate commerce, but we do not rely upon this circumstance alone to sustain the regulation. Moreover, we do not rely upon the fact that a large part of the tobacco shipped after sale to factories in North Carolina for manufacture is subsequently shipped out of the State. Furthermore, we do not contend in this case, as the petitioners' brief seems to suggest, that the validity of this regulation rests on the proposition that the production of tobacco or its transportation from the farm to the auction market is a part of interstate commerce.

state or foreign commerce. We submit that this view is basically unsound. Sales of tobacco for interstate or foreign shipment are themselves transactions in interstate or foreign commerce. They may be prohibited by Congress if the tobacco offered for sale fails to satisfy requirements which Congress deems necessary to make effective the regulation of interstate and foreign commerce in tobacco which it has found to be appropriate and wise.

Furthermore, Congress may properly provide for such inspection and grading as is necessary to assure conformity with such requirements by all tobacco sold in interstate and foreign commerce through such warehouses, even though the inspection may occur before the tobacco enters such commerce.

The relatively small part of all the tobacco offered at such warehouses which is sold in intrastate commerce is indistinguishable from the interstate tobacco, directly affects the interstate and foreign sales, and is subject to similar regulation by Congress.

A. *Congress may prohibit interstate sales of uninspected tobacco*

Interstate commerce consists of buying and selling as well as transportation. The rule is well stated in *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282 (p. 290):

> Such commerce is not confined to transportation from one State to another, * * *
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> * * * * * * * * where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation (*American Express Co.* v. *Iowa*, 196 U. S. 133, 143).

Similarly the rule is stated in *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189, 198:

> Buying for shipment, and shipping, to markets in other States when conducted as before shown constitutes interstate commerce—the buying being as much a part of it as the shipping.

See also *Swift & Co.* v. *United States*, 196 U. S. 375, 398; *Flanagan* v. *Federal Coal Co.*, 267 U. S. 222, 225; *Stafford* v. *Wallace*, 258 U. S. 495, 519; *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 10; *Globe Elevator Co.* v. *Andrew*, 144 Fed. 871; *Krueger* v. *Acme Fruit Co.*, 75 F. (2d) 67, 68 (C. C. A. 5th).

Under that principle the sale of grain at country elevators has consistently been held to be a part of interstate commerce and accordingly immune from state regulation. *Lemke* v. *Farmers Grain Co.* 258 U. S. 50; *Shafer* v. *Farmers Grain Co.* (*supra*); *Dahnke-Walker Milling Co.* v. *Bondurant* (*supra*).

The grain trade in North Dakota, involved in the *Shafer* and the *Lemke* cases, is strikingly similar

to the North Carolina flue-cured tobacco industry. Like the North Carolina tobacco the grain is sold by the farmers locally. The buyers immediately transport the greater part of it to terminal markets in other States for resale. Only about 10% of the grain is manufactured and consumed in North Dakota and never leaves North Dakota.

If the States are powerless to inspect and grade crops sold interstate, Congress must possess that power. This was specifically stated in the *Lemke* case, where the Court said (258 U. S. at 60–61):

> It is alleged that such legislation is in the interest of the grain growers and essential to protect them from fraudulent purchases, and to secure payment to them of fair prices for the grain actually sold. This may be true, but Congress is amply authorized to pass measures to protect interstate commerce if legislation of that character is needed. The supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which clearly encroach upon the field of interstate commerce placed by the Constitution under federal control.

The principles applied by these decisions to sales of grain at country elevators for interstate shipment are clearly applicable as well to sales of tobacco at the warehouses for interstate shipment. Thus the sale of tobacco at the warehouse when the buyer immediately thereafter transports the tobacco out of the State is itself interstate commerce

and subject to Federal regulation.[6] The power of Congress to regulate the large proportion of sales for shipment abroad may be even clearer.[7]

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[6] See the dissenting opinions in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 319–320, 326, which indicate that the price of coal sold at the mine for interstate shipment may be regulated under the commerce clause. The majority of the Court in the *Carter* case did not find it necessary to pass upon this question, and its opinion in no sense conflicts with the views of the minority here referred to.

[7] This Court has said that the power to regulate commerce, though conferred by the same words of the commerce clause, may not be so broad when exercised in respect of interstate commerce as when exercised as to foreign commerce. *Atlantic Cleaners and Dyers* v. *United States*, 286 U. S. 427–434. Whatever limitations the Fifth Amendment, or any other provisions of the Constitution, may impose upon the power to regulate interstate commerce, it appears that the power to regulate foreign commerce acknowledges no limitations. Thus, under the foreign commerce power, the Congress has a "plenary power in respect to the exclusion of merchandise brought from foreign countries" (*Buttfield* v. *Stranahan*, 192 U. S. 470–492); "so complete is the authority of Congress over the subject that no one can be said to have a vested right to carry on foreign commerce with the United States" (*The Abby Dodge*, 223 U. S. 166, 176, 178). Acting under the foreign commerce power, the Congress may "exclude merchandise at discretion" (*Buttfield* v. *Stranahan*, page 493), "for any reason" (*Brolan* v. *United States*, 236 U. S. 216–218); and the scope of this power is so thoroughly settled that contentions to the contrary are so devoid of merit as to cause them to be frivolous" (*Weber* v. *Freed*, 239 U. S. 325–329). Just as under the Tea Inspection Act, considered in *Buttfield* v. *Stranahan*, the power to regulate the importation of tea embraced the power to exclude tea for whatever reason, so under The Tobacco Inspection Act, the power of Congress in so far as it is exercised in relation to export tobacco is unqualified and unlimited.

The petitioners appear to contend that although the completed sale may constitute interstate commerce, the offer, acceptance of which completes the sale, is not a part of interstate commerce. To say the least, this effort to divide a sale into interstate and intrastate segments by driving a fine wedge between the offer and the acceptance is not persuasive. If selling commodities is interstate commerce each element of the transaction by which the sale is completed is equally a part of interstate commerce. If Congress can regulate sales by which commodities enter interstate commerce, it can regulate the offer as well as the acceptance. The regulation, if it be a regulation, imposed by this Act, would be utterly ineffective if the grower were required to wait until after his tacit acceptance of the bid to be informed of the standard grade of the tobacco he had already sold. Obviously the concession which petitioners seem to make of a Federal power to regulate such a sale after it has occurred is merely a negation of the power to regulate the sale—a power long recognized by this Court.

B. *Congress may provide under the commerce power for inspection of tobacco at the warehouse*

If Congress can regulate the sale, it can require that the tobacco sold be graded so as to protect farmers against receiving unreasonably low prices at the sale. Cf. *Shafer* v. *Farmers Grain Company*, *supra*.

The petitioners claim in this case that because the inspection occurs before interstate commerce has begun, the Act is an attempt to regulate intrastate commerce. To this contention there are two answers.

First, the inspection is not in itself a substantial regulation of any activity of the petitioners. It prohibits no action by the growers or by the buyers of tobacco. Other than the requirement that the warehousemen provide, at negligible cost, tickets in duplicate in a form which provides space for noting the grade of tobacco, it requires no affirmative action by anyone except the Government inspector whom the warehousemen must permit to come on the warehouse floor to inspect the tobacco. Apparently the inspector's presence for this purpose is not deemed burdensome when he inspects for a fee at the request of owners of the tobacco. See note 9, page 26, *infra*. Certainly it is no more burdensome when he conducts free inspection pursuant to Section 5 of the Act.

Second, even if the inspection be deemed a regulation of the petitioners' activities in intrastate commerce, it directly affects the interstate and foreign commerce to be regulated and is necessary to the effective execution of the regulation of such commerce which Congress has prescribed in the Act. Consequently, it is within the power of Congress to enact laws necessary to the execution of its power to regulate the interstate commerce in tobacco.

Practical considerations dictate the time when the inspection must occur if the regulation is to be effective. When Congress merely provides that commodities not shown to meet the required standards cannot enter a transaction clearly in interstate commerce it is immaterial when the inspection, necessary to qualify the commodities for such commerce, occurs. Livestock are required to be inspected in order to exclude unwholesome meat from interstate and foreign commerce.[1] Obviously if the purpose is to exclude such meat from interstate commerce the inspection must occur before it enters such commerce. In fact the law requires inspection before the live animals are even allowed to enter a slaughterhouse. Rejection from interstate commerce of products of uninspected animals has been sustained. *Pittsburgh Melting Co.* v. *Totten*, 248 U. S. 1.

In the case of tobacco the inspection is required in order to provide growers and buyers with accurate knowledge of the grade of the tobacco offered for sale. It must occur before the sale if it is to give them this information. The availability or absence of information as to grade provided by the inspection directly affects the interstate commerce which follows immediately after the inspection. Inspection after the sale could have no effect upon the evils inherent in such sales which Congress seeks by this Act to eradicate.

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[1] Act of March 4, 1907, c. 2907, 34 Stat. 1260.

It is apparent, therefore, that the provision for inspection is merely a necessary and proper means of making effective the power of Congress to regulate that part of interstate and foreign commerce in tobacco which takes place on the auction markets. Even if it occurs just before the tobacco has technically entered interstate or foreign commerce it is within the recognized power of Congress to regulate intrastate transactions which directly affect interstate and foreign commerce. *Virginian Railway Co.* v. *System Federation No. 40*, 84 F. (2d) 641, affirmed, 300 U. S. 515; *Minnesota Rate Cases*, 230 U. S. 352; *Shreveport Case*, 234 U. S. 342. Such regulation may be applied to acts which affect interstate purchases as well as interstate transportation. Cf. *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 301 U. S. 1, 38. It is not limited to intrastate action by persons another part of whose activities are interstate. Congress can regulate wholly intrastate activities of persons who engage in no interstate commerce whatever where such local activities directly affect interstate activities conducted entirely by others. *Consolidated Edison Company of New York et al.* v. *National Labor Relations Board et al.*, decided December 5, 1938, No. 19.

Here, regardless of whether the warehousemen's functions, including the offering of the tobacco for interstate sale, are wholly intrastate, as petitioners contend, the fact that the tobacco held for sale is

or is not accurately graded clearly affects the interstate sales. Consequently such tobacco is subject to regulation, and the warehousemen who have custody of it may be required to permit it to be inspected while it is in their custody.

Moreover, the petitioners do not seriously contend that the inspection substantially burdens or interferes with or regulates any activity of theirs except the sale of ungraded tobacco.* The real objection in this case is not to the inspection but to the prohibition of sales in interstate commerce of ungraded tobacco. That regulation is clearly within the power of Congress.

Congress has frequently exercised this power to require inspection and grading of commodities entering interstate and foreign commerce and has excluded from such commerce commodities which have not been inspected or which fail to meet the

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* Inspection for a fee at the request of growers had been conducted for several years at the petitioner's warehouse (R. 85, 92), not only without their objection (R. 92), but, it is understood, with their complete cooperation. Even in this case they make no objection to such inspection although it would appear to affect them where applied in precisely the same way as the required inspection. In an unreported case similar to this (*Singletary and Epps et al.* v. *Wallace et al.*, in the District Court of the United States for the Eastern District of South Carolina) the plaintiffs particularly requested that the injunction sought should not interfere with the provisions of the Act when the grower requested that his tobacco be inspected and certified, and the order in that case so provided. It seems abundantly clear that warehousemen do not object to inspection, as such, being conducted at their warehouses.

standards deemed essential to the welfare of such commerce. Diseased livestock [10] and diseased plants,[11] have been excluded from interstate commerce. Likewise grain,[12] and rosin and spirits of turpentine [13] are required to be inspected and graded, or referred to according to prescribed standards, as a condition to their entering interstate commerce. Apples and pears may not be received for foreign shipment unless they are certified as conforming with prescribed standards of quality.[14]

Inspection of livestock [15] has been held valid. *Pittsburgh Melting Co.* v. *Totten, supra.* The establishment and enforcement of Federal grain standards in interstate commerce has been tacitly approved by this Court in the cases cited above dealing with conflicting efforts by States to regulate grain standards. Others of these laws have been in effect for many years without question as to their constitutionality.

The time when the inspection must be made under such laws does not affect the validity of the

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[10] Act of May 29, 1884, c. 60, 23 Stat. 31.

[11] Act of March 4, 1917, c. 179, 39 Stat. 1165.

[12] Act of August 11, 1916, c. 313, 39 Stat. 482 (7 U. S. C. 71-87) (United States Grain Standards Act).

[13] Act of March 3, 1923, c. 217, 42 Stat. 1435 (7 U. S. C. 91-99) (The Naval Stores Act).

[14] Act of June 10, 1933, c. 59, 48 Stat. 123 (7 U. S. C. 581).

[15] Act of March 4, 1907, c. 2907, 34 Stat. 1260.

regulation of commerce, to the accomplishment of which the inspection is necessary.

That the Tobacco Inspection Act is a valid regulation of interstate commerce is clearly indicated, though not specifically decided, in *Townsend et al.* v. *Yeomans et al.*, 301 U. S. 441. That was a suit brought by tobacco warehousemen to restrain enforcement of a Georgia statute fixing maximum charges for the handling and selling of leaf tobacco. The auction system of selling tobacco exists in Georgia in substantially the same form as it does in North Carolina. The warehousemen attacked the statute on the ground that the State of Georgia had no power to enact the regulation, as it attempted to govern transactions in the course of interstate and foreign commerce and, further, upon the specific ground that Congress had assumed exclusive jurisdiction over this field of legislation by passing the Tobacco Inspection Act. The Court held that the Georgia statute was not inconsistent with the Tobacco Inspection Act but, on the contrary, served further to carry out its purposes. The whole opinion indicates that the Court assumed that the transactions on the warehouse floor were in interstate and foreign commerce and that it sustained the Georgia statute merely because it did not impose any direct burden upon such commerce or conflict with the Tobacco Inspection Act. In the course of the Court's opinion it was said (p. 455):

> Laying on one side the federal statute, [Tobacco Inspection] as in no way inconsistent, we find no ground for concluding that the state requirements lay any *actual* burden upon interstate or foreign commerce.

And further (p. 459):

> Here the Georgia Act lays no constraint upon purchases in interstate commerce, does not attempt to fix the prices or conditions of purchases, or the profit of the purchasers. It simply seeks to protect the tobacco growers from unreasonable charges of the warehousemen for their services to the growers in handling and selling the tobacco for their account. Whatever relation these transactions had to interstate and foreign commerce, the effect is merely incidental and imposes no direct burden upon that commerce. The State is entitled to afford its industry this measure of protection until its requirement is superseded by valid federal regulation.

C. *Congress may also prohibit the sale of uninspected tobacco in intrastate commerce in the circumstances prevailing on the auction markets*

The appellants also claim that the Act is invalidated by the fact that it prohibits the sale of ungraded tobacco which is to be manufactured, and perhaps used, in North Carolina, as well as tobacco sold in interstate and foreign commerce. It cannot be denied that the tobacco to be sold intrastate will be inspected under the Act and that intrastate sales of uninspected tobacco are equally prohibited.

But Congress has the power to apply its regulation to both interstate and intrastate transactions when they are inseparably commingled, as they are here.

At the time of the auction sale, when the prohibition objected to becomes effective it is impossible to distinguish the intrastate tobacco from that sold in interstate and foreign commerce. At the time of the inspection—and indeed until the acceptance of the final bid, when the identity of the purchaser is first known—it is impossible to determine whether a particular lot will be shipped interstate or intrastate. Even after the sale it may not be possible to determine whether the immediate shipment will be interstate or intrastate if the buyer represents one of those companies having manufacturing facilities both in and out of North Carolina. In such circumstances the Federal power must apply to both or disappear altogether.

The courts have frequently held that Congress is not divested of its power to regulate an interstate activity merely because the regulation may also apply to interwoven and inseparable intrastate transactions. *Minnesota Rate Cases,* 230 U. S. 352; *Shreveport Case,* 234 U. S. 342; *Wisconsin Railroad Commission* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563; *Virginian Ry. Co.* v. *System Federation No. 40,* 84 F. (2d) 641, 647–651, affirmed, 300 U. S. 515.

Those decisions which have permitted the Federal and state governments to achieve legitimate ends even though the achievement entailed the reg-

ulation of certain activities which were normally byond their reach are also pertinent. See *Jacob Ruppert* v. *Caffey*, 251 U. S. 264; *Westfall* v. *United States*, 274 U. S. 256. *Jacob Ruppert* v. *Caffey* involved the war-time prohibition Act, which prohibited the sale of both intoxicating and non-intoxicating liquor. In a previous decision (*Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146) this Court had held the statute valid upon the ground that the prohibition of intoxicating liquor increased the Nation's war efficiency. In the *Ruppert* case, *supra*, the plaintiff contended that the prohibition of non-intoxicants was void because it had no tendency to increase war efficiency. The Court rejected the argument because it felt that the prohibition of both was necessary if the prohibition of intoxicants was to be effective, saying (p. 301):

> Since Congress has power to increase war efficiency by prohibiting the liquor traffic, no reason appears why it should be denied the power to make its prohibition effective.

In *Westfall* v. *United States*, 274 U. S. 256, Mr. Justice Holmes said (p. 259):

> Moreover, when it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so.

Compare *St. John* v. *New York*, 201 U. S. 633; *Purity Extract & Tonic Co.* v. *Lynch*, 226 U. S. 192.

Since Congress has the power to require inspection and grading of tobacco sold for shipment in interstate commerce, it likewise has the power to make its regulations effective by enforcing the same requirements with respect to tobacco which is indistinguishable at the time the regulation is effective, but which thereafter proves to have been in intrastate commerce.

II

POWERS OF CONGRESS OTHER THAN THE POWER TO REGULATE COMMERCE SUSTAIN THE TOBACCO INSPECTION ACT

In the bill of complaint the petitioners allege that the Tobacco Inspection Act purports to derive its authority from the commerce clause of the Constitution (R. 6). Both courts below also treated it as based solely on the commerce power. The petitioners' argument may be construed as admitting that while, under the commerce clause, the United States might prohibit interstate or foreign sales of ungraded tobacco, it lacks power under the commerce clause to make such regulation effective by inspecting for grade, tobacco destined for interstate or foreign commerce before the tobacco has entered such commerce. We believe that this view is clearly erroneous, and that the Act, including its provision for inspection, is valid as an exercise of the commerce power and should be sustained on that ground, without more. However, we submit that other Federal powers, as well as the commerce

power, sustain the inspection of tobacco regardless of whether it is in interstate or foreign commerce when the inspection occurs, and that such powers together with the commerce power clearly sustain the Act in all particulars.

The burden is upon one who challenges the validity of a Federal Act to overcome the presumption of its validity [16] and to show that it is not sustained by any one or any combination of the several powers of Congress.[17] Congress, in a single statute, may exercise simultaneously any number of its powers. Such powers, used together, each sustaining a particular part of a plan of regulation, may sustain an Act, all parts of which could not be sustained by any one of the powers alone.[18] Moreover, such separate powers used together may each support and contribute to the effectiveness of the other.

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[16] *Legal Tender Cases* (12 Wall. 457, 531); *Commonwealth* v. *Smith* (4 Binney 117, 123); *Sinking-Fund Cases*, 99 U. S. 700, 718; *Buttfield* v. *Stranahan*, 192, U. S. 470, 492; *James Everard's Breweries* v. *Day*, 265 U. S. 545, 560.

[17] See *Cohens* v. *Virginia*, 6 Wheat. 264. In that case it was argued for the State of Virginia that "Any single measure which congress may adopt, must be justified by some single grant of power, or not at all. No combination of several powers can authorize congress to adopt a single measure which they could not adopt, either by one or another of those powers, combined with the power to pass necessary and proper laws for carrying such single power into effect" (p. 339). This argument was rejected in the opinion of the Court (pp. 423–429).

[18] *Legal Tender Cases*, 12 Wall. 457; *Julliard* v. *Greenman*, 110 U. S. 421. See 2 *Story's Comm.*, Sec. 1256 (5th ed.); *Willoughby on the Constitution*, 2d ed., 1929, Sec. 54.

In *McCulloch* v. *Maryland*, 4 Wheat. 316, a combination of powers was held to sustain the power of Congress to establish a National Bank. In the *Legal Tender Cases*, 12 Wall. 457, a combination of powers was held to sustain the authority of Congress to issue irredeemable paper money and make it legal tender. See also *Cohens* v. *Virginia*, 6 Wheat. 264; *United States* v. *Gettysburg Electric Railway*, 160 U. S. 668.

The point we make here is not the assertion of inherent sovereign power of the United States to make any regulations that may be deemed necessary, implied from its essential sovereignty, although not expressly granted. It is merely that powers specifically granted to the Federal Government, other than the commerce power, sustain the inspection of tobacco even if the tobacco is not in interstate commerce when the inspection occurs, that the commerce power sustains the exclusion of ungraded tobacco from interstate commerce, and that these separate powers, exercised together and each sustaining a separate part of the plan embodied in this Act, are effective, in combination, to sustain the entire Act.

A. *Powers other than the commerce power sustain Federal inspection of tobacco*

Section 3 of the Act provides that the Secretary of Agriculture shall establish and promulgate standards for measuring the quality of tobacco, for measuring its type, grade, size, condition, and other characteristics. These are to be the official

standards of the United States. We submit that the standards thus prescribed are standards of measure which Congress may prescribe under its power to fix the standard of measures and that the inspection is an appropriate means of carrying that power into execution.

It seems clear historically that the Federal power to fix the standard of measures includes the power to fix standards for measuring characteristics other than mere length, area, and volume. Usage preceding the adoption of the Constitution indicates that "measure" did not then mean merely size.[19] Quality was, and still is, an essential element of the measure of an object. In one sense "quality" is a synonym for "measure." In addition "measure" is used as an abstract word requiring specification of the characteristic to be measured. The word as used in the Constitution is not qualified. That it embraces the measure of quality is evident from the history of the provision. Standards of quality were insisted upon by those trading in commodities during the colonial period and particularly by those dealing in tobacco.[20] Laws were

[19] See *Ryder*, A New Universal English Dictionary (1759), *Dyche*, a New General English Dictionary (1760), *Sheridan*, a Complete Dictionary of English language—which indicate that "measure" was then used with reference to the particular characteristic sought to be measured, as the measure of quantity, the measure of quality, the measure of ability.

[20] See *Turner* v. *Maryland*, 107 U. S. 38.

See also *Gray*, History of Agriculture in Southern United States to 1860 (1933), pages 224 *et seq.*; *Wickoff*, Tobacco Regulation in Colonial Maryland (1936).

adopted to establish standard grades and were considered as embodying the power to determine and enforce conformity with the standards established. These local laws fell short of desirable effectiveness because of variations in local practice and enforcement.[21] When the Articles of Confederation were drafted Congress was empowered to fix the standard of weights and measures. The provision was carried over into the Constitution and was confirmed and supported by the additional power to revise and control state inspection laws.[22]

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[21] *Gray*, op cit. *supra*, pages 219-276.

[22] Constitution, Article I. Sec. 10, cl. 2, reads as follows: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

In *Foote* v. *Maryland*, 232 U. S. 494, at page 503, this Court, considering the purposes of this expressly limited power of the states to provide for inspection, said: "Inspection is intended to determine the weight, condition, quantity and quality of merchandise to be sold within or beyond the State's borders. It is usually accomplished by looking at or weighing or measuring the thing to be inspected. * * *." It seems clear that power of the States to pass inspection laws, subject to revision and control by Congress, provides a means whereby the States may enforce, within the sphere of local state requirements, standards for measuring commodities. As is evident from the above quotation, such power applies to measures of quality. See also *Turner* v. *Maryland*, 107 U. S. 38, 49 *et seq.* The fact that the States' power is subject to the control of Congress indicates the existence of a power in Congress superior to that of

That standards of measure must include standards of quality would appear to be self-evident. The power appears obviously to be in part, at least, a power to provide standards to be used in commercial intercourse. Mere determinations of length, or area, or volume are of little or no practical significance in commerce if the substance of the thing so measured is unknown. The scope of the power to fix the standard of measures would be limited far short of the normal implications of the word "measure" if it should be construed as not including the power to specify standards for measuring the substance as well as the mere size of commodities. There is nothing in the language used nor in the history of the provision to justify such a limited construction.

Inspection of commodities is a necessary and proper aid to the determination of such standards. The power to fix standards of measure is not expressly related to the commerce clause nor limited by it. Such inspection of commodities as may be necessary to fix standards may be made without regard to whether the commodities inspected are in interstate or foreign commerce. The Tobacco Inspection Act provides for the fixing of standards for grading tobacco. But the Act itself did not fix the standards nor exhaust the Federal power to do

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the States with respect to matters of national concern. Such Federal power must likewise extend to measures of quality, and must also include the power to enforce by inspection conformity with the standards prescribed.

so. On the contrary the Act provides that the exercise of the power shall be continuous. It not only authorizes the Secretary to issue tentative standards before he announces official standards but also provides that after official standards have been prescribed he may modify them. (Act. Sec. 3, R. 19 (2).) The inspection of tobacco about to be sold and the preservation of a record of the facts thereby observed, for both of which this Act provides and to both of which the petitioners appear to object, are appropriate means for making effective the power to fix standards for measuring the quality of tobacco.

Furthermore, such inspection is a necessary and appropriate means, and perhaps the only means, for determining whether tobacco conforms with the standards prescribed. It may be contended that the power to fix standards does not include the power to enforce compliance with such standards. As has been pointed out above, the historical development of the provision in the Constitution conferring this power indicates that at the time it was adopted, and previously, provisions for fixing standards implied the power to make the standards effective.

However, if it be said that the Federal power to enforce such standards is limited to transactions which themselves are subject to Federal regulation by virtue of some other provision of the Con-

stitution, it seems clear that this is such a case. The interplay of the two separate powers becomes apparent in such a situation. Congress, under the commerce power, here excludes from interstate commerce tobacco not shown to conform to one or another of the standards of quality which, under the power to fix the standard of measures, it has prescribed as the official standards for the United States. The enforcement of such standards requires merely that the grade of the tobacco be established. The inspection is merely the means of establishing that fact. It might be said that the power to regulate interstate commerce is being used as a sanction to enforce conformity in such commerce, with standards prescribed under the power to fix standards of measure. Or it might be said that the power to fix standards of measure, and to enforce their use in transactions within the purview of federal power, is being used as an aid to the effective regulation of interstate and foreign commerce. We submit that both are true. That each power is being used to aid the execution of the other. But if either is true, the power to inspect the tobacco before it enters interstate commerce is clear. In either case it is a necessary and proper means of making effective the power to fix, and in such transactions to enforce, Federal standards of measure. As a means of effectuating that power it need not await the commencement of interstate

commerce but may precede it if that is necessary to ascertain the conformity of the tobacco in question to the grades established under that power. Here we have two granted powers each used to aid the other; the power to fix standards of measure sustaining the establishment of the standard and the inspection, made to determine whether tobacco conforms with it; the power to regulate interstate and foreign commerce establishing the propriety of enforcing the standards and, by sustaining the exclusion of ungraded tobacco from such commerce, providing the means of enforcing them. Both are expressly granted powers. If inspection of the tobacco before it enters interstate and foreign commerce could not be sustained as a necessary means of enforcing the commerce regulation, it can be sustained as a means of carrying into execution the power to fix and enforce standards for measuring the quality of tobacco.

The right to inspect tobacco may be further sustained by the power constantly exercised by Congress to procure information necessary to the effective exercise of its granted powers. This power has been treated as a derivative or extension of the power to take a census. *United States* v. *Moriarity,* 106 Fed. 886 (C. C. S. D. N. Y., 1901). See also *United States* v. *Sarle,* 45 Fed. 191; *United States* v. *Mitchell,* 58 Fed. 993; *United States ex rel. City of Atlanta, Georgia* v. *Steuart,* 47 F. (2d) 979. It may be that the procuring of such infor-

mation may be more readily sustained as merely action necessary to the effective execution of the powers specifically granted to the Federal Government. Whatever may be the constitutional source of the power to procure such statistics it has long been exercised and has not been seriously questioned.

Sections 3 and 9 of The Tobacco Inspection Act (R. 19 (2) and 19 (4)) provide for the procuring of information regarding quality and prices of tobacco. The character of the information required is directly analogous to that required under the Census Act of March 3, 1899, involved in *United States* v. *Moriarity, supra.* The collection of tobacco statistics by the Census Bureau was specifically provided for in 37 Stat. 106–108. This function was later transferred to the Department of Agriculture (45 Stat. 1079) and eventually became Section 9 of The Tobacco Inspection Act and Section 1 of the Tobacco Statistics Act (49 Stat. 893, 7 U. S. C., Supp. III, 501).

The inspection of tobacco is an appropriate means of procuring such information regarding the quality of tobacco entering commerce. If this power had been exercised alone under this Act, there is little likelihood there would have been serious objection to the inspection. The fact that the information procured by the inspection is required to be made available forthwith to all growers to effectuate an exercise of the commerce

power, although it undoubtedly gives rise to the petitioners' objection, does not destroy the existence of either power, nor make the exercise of either power invalid. If they could properly have been exercised separately, they can be exercised with equal propriety together.

Furthermore, the existence of the power to inspect commodities is emphasized by the limitations imposed upon the recognized power of the States to enact and enforce inspection laws. The grant of Federal power to revise and control State inspection laws may not itself confer a Federal power superior to the States' power to enforce inspection laws, but it clearly recognizes the existence of such a power. It seems clear that the Federal power thus recognized is adequate to protect the exercise of any of the specifically granted Federal powers against interference by State inspection laws or by any levies made by States to support the enforcement of such laws; for example, to protect the enforcement of standards of measure prescribed under the powers to fix such standards and enforce them in transactions in interstate commerce.[23] Here again the power recognized may be merely the power to enact laws necessary to the effective execution of the granted powers. But such recognition in the field of inspection greatly strengthens the view that the Federal Government may inspect tobacco still in intrastate commerce if such inspec-

[23] See *Turner* v. *Maryland*, 107 U. S. 38, 57–58.

tion is necessary to maintenance of standards or to effective regulation of interstate commerce in tobacco.

That the power referred to by this limitation on the States' inspection laws sustains the Federal Government in the inspection of tobacco is suggested by a comment upon this clause made by Mr. George Mason in the Virginia Convention:

> Mr. Chairman, if gentlemen will attend to this clause, they will see we cannot make any inspection law but what is subject to the control and revision of Congress. * * * Congress are to make regulations for tobacco (3 Elliott 481–482).

Any of these powers would justify the inspection required under this Act. Under none of them is the Federal power limited to commodities in interstate and foreign commerce. They are separate and independent Federal powers expressly granted or expressly recognized. They sustain the inspection, even if the tobacco when inspected on the warehouse floor is not in interstate commerce.[24]

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[24] Inspection of commodities incident to the maintenance of standards prescribed by Congress for commercial commodities has been frequently provided for. Cotton Standards Act, 7 U. S. C. 51–65; Naval Stores Act, 7 U. S. C. 91–99; Insecticides Act, 7 U. S. C. 121–134; Pure Food and Drugs Acts, 21 U. S. C.; Warehouse Act, 7 U. S. C. 241–273; Certification of Agricultural Products Act, 7 U. S. C. 414; Inspection of Perishable Products Act, 7 U. S. C. 499n. The Tobacco Inspection Act now challenged is but the most recent of this series of statutes.

In this view each of the two elements of this Act to which the petitioners seem to object is sustained by a separate Federal power; the inspection by the powers just discussed; the exclusion from interstate commerce of ungraded tobacco by the commerce power. Each of the specified powers exercised with respect to tobacco gives reciprocal support to the effectiveness of the other. If it should be held that neither is sufficient in itself to sustain all details of this Act, it would seem clear that used together they do sustain it.

III

THE TOBACCO INSPECTION ACT DOES NOT UNLAWFULLY DELEGATE LEGISLATIVE AUTHORITY TO THE SECRETARY OF AGRICULTURE OR TO THE TOBACCO GROWERS

The contentions in this case illustrate the rather fantastic limitations upon the Congress which counsel read into the decisions of this Court on the subject of delegation of power. The confusion and uncertainty surrounding this subject not only lead earnest members of the profession into repeated attacks upon legislation as unlawfully delegating

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These measures, having to do with commodities largely dealt with in interstate and foreign commerce, have been treated as resting upon the commerce power. The fact that each of them may be a valid exercise of that power by no means prevents them from representing at the same time, as we believe they do, a valid exercise of the power to prescribe standards for measuring quality, of the power to procure statistics with regard to commerce in commodities, and the express power to enact laws necessary to carry the commerce power into execution.

power, but also present to legislators a dilemma in framing legislation.

They are confronted on the one hand with the nebulous requirements of due process. If they pronounce a rigid set of standards, unforeseen cases to which the standards may apply present the danger of unconstitutionality because of caprice or arbitrary application. If, on the other hand, they seek to avoid the danger of capricious and arbitrary application through provision for flexibility in application, the statute is then attacked for undue delegation, an equally nebulous and undefined concept. This dilemma of avoiding the infirmity of unlawful delegation by running into the infirmity of caprice, or vice versa, faces legislators in most of their important tasks.

There is urgent need for some clarification of the doctrine of non-delegability. If it is to be applied to legislation, it is only just to legislators that standards be clearly outlined by which the adequacy of legislative standards is to be tested. The invocation of a vagrant and uncanalized judicial doctrine to prevent vagrant and uncanalized legislation leaves both legislators and litigants confused.

A. *The status and basis of the doctrine of non-delegability*

It is well settled that by judicial decision the Constitution does not completely forbid delegation of legislative power. It is acknowledged that power to determine the facts which will make legislation

applicable to the acts of particular persons or to particular things is the essence of executive administration of laws, and must and does exist. *United States* v. *Grimaud,* 220 U. S. 506; *Union Bridge Co.* v. *United States,* 204 U. S. 364; *Buttfield* v. *Stranahan,* 192 U. S. 470; *Monongahela Bridge Co.* v. *United States,* 216 U. S. 177; *St. Louis, I. M. & S. Ry. Co.* v. *Taylor,* 210 U. S. 281; *Avent* v. *United States,* 266 U. S. 127; *New York Central Securities Corp.* v. *United States,* 287 U. S. 12; *Federal Radio Commission* v. *Nelson Bros. Co.,* 289 U. S. 266; *Hampton & Company* v. *United States,* 276 U. S. 394.

On the other hand, it is held that the delegation must not be excessive. *A. L. A. Schechter Corp.* v. *United States,* 295 U. S. 495; *Panama Refining Co.* v. *Ryan,* 293 U. S. 388. It would appear that Congress has the power to make reasonable delegation and that the question presented by exercise of the power is not a question of law but a question as to what is, under the circumstances, a reasonable legislative policy—a subject of questionable justiciability.

It should be observed that, while the doctrine has long been discussed, no legislation of the Congress was stricken down upon that theory until within the past five years. It is also to be observed that the only cases in which legislation was held unconstitutional for excessive delegation were the *Schechter* and *Ryan* cases, both of which dealt with

a delegation to the President himself. These cases, therefore, involve the question of separation of powers, for the office of President was not created by the Congress and the President was not responsible to the Congress. The executive was there endowed with nonexecutive functions. The legislative power was there delegated to the President, whose powers are in many respects independent of the Congress. It is generally held that the Judiciary will not assume nonjudicial functions, and that Congress cannot assume nonlegislative functions. It was, therefore, with a measure of consistency that the Executive was excluded from legislative functions beyond those considered necessary in filling in the details of legislation and in determining its applicability.

It is apparent, however, from that circumstance in those cases, that there is no precedent in American constitutional law for striking down legislation which delegates legislative power to an agency created by Congress and controlled by Congress, and where the agency exercising the delegated powers is completely subject to the control of Congress and may at any time be abolished. Whether delegated to so-called independent establishments or boards, or whether delegated to members of the Executive Department whose offices owe their existence and powers to the Congress, these delegations have always been sustained.

The language of the Constitution refers expressly to delegation only in the Tenth Amendment, which provides for the reservation to the

States or to the people of "The powers not delegated to the United States by the Constitution."[25]

These powers, thus delegated to the United States, are distributed by the Constitution, which provides that legislative powers "shall be vested in a Congress",[26] that the executive power "shall be vested in a President",[27] and that the judicial power "shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.[28]

It would appear elementary that no department can *divest* itself of the power thus *vested* in it. In other words, there can be no *alienation* of power.

Delegation, however, stops far short of *divesting* or *alienation.* To turn over to a body created by and responsible to the Congress a defined and limited measure of power, or a power over a given subject or object, at all times subject to recall and supervision by Congress, is in no sense a *divesting* or *alienation* of its power.

The executive power which, it has always been assumed, can be delegated, and would be utterly impotent if it could not be delegated, is vested in the President by the same words that are used to vest the legislative power in the Congress. There

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[25] Nor is the idea of non-delegability anywhere dealt with except perhaps in the prohibition that no money shall be drawn from the Treasury, but in consequence of appropriations made by law.

[26] Art. I, Sec. 1.

[27] Art. II, Sec. 1.

[28] Art. III, Sec. 1.

is no reason to imply a limitation in the language of one section that is not to be implied in the language of the other.

Moreover, the general language vests in the Congress powers which it is obvious could be exercised only through delegates. In the language of the Constitution it is in the Congress that power is vested to *collect* taxes, to borrow money, to coin money, to punish piracies, to raise and support armies, to maintain a navy. It is perfectly obvious that the body of the Congress would not and could not exercise these powers, but that they would be delegated. There is no more reason to doubt that the power to regulate commerce or the power to fix the standard of weights and measures would likewise be delegated.

The power conveyed to Congress to make laws necessary and proper to carry into execution other powers is an interesting grant. The Congress may make laws for carrying into execution what? Its own laws only? No! "To make all Laws which shall be necessary and proper for carrying into Execution the *foregoing Powers,* and *all other Powers* vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." [Italics supplied.] Here in the language of the Constitution was quite clearly the broadest kind of power to choose the means by which *all power* under the Constitution is to be carried into execution. The only limitation which seems reasonable to imply is that any delegation

must stop short of a divestiture of power or an alienation of power. Such would be contrary to the provisions and plan of the instrument.

If it were intended that delegation should have been prohibited, it could have been accomplished by the simplest kind of phrase.

This silence of the Constitution on the subject of delegation has added significance when we consider that the constitutional convention was familiar with the extravagant delegation of governmental power which was in vogue in that day. Not only were the powers of government parceled out to public bodies, but all of the powers of government were actually alienated to trading corporations. There is no better example than the Hudson's Bay Company.

The Hudson's Bay Company was chartered by Charles II in 1670. Prince Rupert and 17 other noblemen and gentlemen were incorporated and granted "the whole and entire trade and traffic" to and from the Hudson's Bay country. The complete lordship and entire legislative, judicial, and executive power was given to the Company.[29] This

[29] Excerpt from the Royal Charter incorporating the Hudson's Bay Company, 22 Charles II (1670) (Willson, *The Great Company*, Vol. II, p. 327):

"And further, our will and pleasure is, and by these presents, for us, our heirs and successors, we do grant unto the said Governor and Company, and their successors, that it shall and may be lawful to and for the said Governor and Company, and their successors, from time to time, to assemble themselves, for or about any [of] the matters, causes, affairs, or business of the said trade, in any place or places for the

governmental power was held and exercised until November 19, 1869, when all its rights of government were returned to the public authorities by a deed of surrender in which the consideration was not merely nominal.

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same convenient, within our dominions or elsewhere, and there to hold Court for the said Company and the affairs thereof; and that also, it shall and may be lawful to and for them, and the greater part of them, being so assembled, and that shall then and there be present, in any such place or places, whereof the Governor or his Deputy for the time being to be one, to make, ordain, and constitute such and so many reasonable laws, constitutions, orders, and ordinances as to them, or the greater part of them, being then and there present, shall seem necessary and convenient for the good government of the said Company, and of all governors of colonies, forts, and plantations, factors, masters, mariners, and other officers employed or to be employed in any of the territories and lands aforesaid, and in any of their voyages, and for the better advancement and continuance of the said trade or traffic and plantations, and the same laws, constitutions, orders, and ordinances so made, to put in use and execute accordingly, and at their pleasure to revoke and alter the same or any of them, as the occasion shall require: And that the said Governor and Company, so often as they shall make, ordain, or establish any such laws, constitutions, orders, and ordinances, in such form as aforesaid shall and may lawfully impose, ordain, limit, and provide such pains, penalties, and punishments upon all offenders, contrary to such laws, constitutions, orders, and ordinances, or any of them, as to the said Governor and Company for the time being, or the greater part of them, then and there being present, the said Governor or his Deputy being always one, shall seem necessary, requisite or convenient for the observation of the same laws, constitutions, orders, and ordinances; and the same fines and amerciaments shall and may, by their officers and servants from time to time to be appointed for that purpose, levy, take, and have, to the use of the said Governor and Company, and their successors,

Virginia itself was settled under charters granted to "the London Company" and to the "Plymouth Company" in 1606. The London Company in 1607 sent its first colonists to the James River.[30]

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without the impediment of us, our heirs or successors, or any of the officers or ministers of us, our heirs or successors, and without any account therefore to us, our heirs or successors, to be made: All and singular which laws, constitutions, orders and ordinances, so as aforesaid to be made, we will to be duly observed and kept under the pains and penalties therein to be contained; so always as the said laws, constitutions, orders and ordinances, fines and amerciaments, be reasonable and not contrary or repugnant, but as near as may be agreeable to the laws, statutes or customs of this our realm.

* * * * * * * * * and that the said Governor and Company shall have liberty, full power and authority to appoint and establish Governors and all other officers to govern them, and that the Governor and his Council of the several and respective places where the said Company shall have plantations, forts, factories, colonies or places of trade within any of the countries, lands, or territories hereby granted, may have power to judge all persons belonging to the said Governor and Company, or that shall live under them, in all causes, whether civil or criminal, according to the laws of the kingdom, and to execute justice accordingly."

[30] The story of its change of government is told by Hockett in "Political and Social Growth of the United States," pp. 55–56:

"These changes in the economic system were accompanied by changes of equal importance in the government. The arrangements for government were at first quite incidental, but the Company's enterprise was carried on so far from home that some provision was necessary for preserving order. Under the charter of 1606 the King retained the right to govern the settlers through a council in London which appointed members of the Company in the colony as a sub-

It seems clear that the people were not averse to delegation of legislative power or concerned about placing restrictions on such delegation for legislative delegation was a fairly common phenomenon in the statutes passed by the colonial governments themselves immediately prior and subsequent to the adoption of the Constitution.

Our hurried examination of the laws of the thirteen original States, both prior to and after the Revolution, discloses instances of delegation which

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ordinate council, to rule according to instructions sent out from time to time. While as agents of government this council received orders from the King, as business managers for the Company they were subject to the instructions of the adventurers.

"The plan was too clumsy to work well, and under a new charter of 1612 the Company became a self-governing corporation, with the privilege not only of managing its business affairs but of governing the people in the plantation. It was authorized to hold a meeting in London four times each year, known as the 'General Court,' at which a majority of the stockholders present could elect officers and make 'such Laws and Ordinances for the Good and Welfare of the said Plantation' as they thought 'requisite and meet,' so long as they were not contrary to the laws of England. For the transaction of routine business there was a smaller body, including the officers chosen by the General Court. From this time the London Company was commonly known as the 'Virginia Company.'"

The charter to "The Treasurer and Company of Adventurers and Planters of the City of London, for the First Colony of Virginia" (Charter of James I, May 23, 1609) contains, among other grants of power, the following:

"XIV. And also to make, ordain, and establish all manner of orders, laws, directions, instructions, forms, and ceremonies of government and magistracy, fit and necessary, for and concerning the government of the said Colony and

undoubtedly could be multiplied upon further search. In the statutes which we have found, it will be observed not only that the extent of the delegation varied with the subjects of legislation but that what is known today as a primary standard was not always prescribed in the Acts by which the power was delegated. The occasion for delegation, moreover, seems clearly to have been the same then as it is now. No better proof of this statement could be desired than is found in the Act passed by the General Assembly of the State of Vermont on February 27, 1787 (Vermont Laws Revised, 1787 [Haswell] pp. 77–78). That statute is as follows:

> Whereas it has been found by experience, that great advantage has been taken, by ferrymen demanding unreasonable prices for their service. And whereas, this assem-

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Plantation; and the same at all times hereafter, to abrogate, revoke, or change, not only within the precincts of the said Colony, but also upon the seas in going and coming to and from the said Colony, as they, in their good discretion, shall think to be fittest for the good of the adventurers and inhabitants there (Sherman, 'Governmental History of the United States,' p. 65)."

In the third charter granted by James I to the London Company, the following provision is found (Charter of March 12, 1612):

"VIII. * * * and shall likewise have full power and authority to ordaine and make such laws and ordinances, for the good and welfare of the said plantation, as to them, from time to time, shall be thought requisite and meet: *so always as the same be not contrary to the laws and statutes of this our realm of England;* * * *" (*Id.*, p. 79)."

bly cannot so well distinguish between the several rivers, and the several parts of said river, pond, or lake, on account of distance, swiftness of water, number of travelers, etc. Therefore to prevent such impositions for the future,

Be it enacted by the general assembly of the state of Vermont That the magistrates, selectmen, and constables, of the several towns where ferries are needed, shall meet before the first day of August annually, at a time and place by them agreed upon, and appoint proper persons and places for ferries, and provide suitable roads to and from the same; and further regulate the price thereof, according to the profits of such ferries, and price of labour; to be varied from time to time, as occasion shall require.

* * * * *

And if any person or persons shall transgress this act, by demanding any greater sum for ferriage than shall be stated by the authority aforesaid, he or they shall, for every such offense, forfeit the sum of fifteen shillings; * * *

It is apparent from the preamble to this Act that the legislature was compelled by the circumstances of the case to delegate the power to legislate to local authorities. Doubtless, similar circumstances induced the legislatures of other States to delegate rate-making power. In this regard, however, legislation was not uniform among the States or colonies. Sometimes the legislature itself promulgated rules to govern the operation of ferries and

prescribed in detail the rates which should be charged for the carriage of persons, animals, freight, etc.[21] In other States the legislatures did not undertake to regulate public ferries and prescribe the rates therefor, but delegated the power to do so.[22]

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[21] For examples of such laws see Virginia: Act 22 George II (1748), Chap. XI, Virginia Laws, 1769, pp. 204-213; Act of December 26, 1792, 1 Compiled Laws (1776-1807), pp. 221-228. Massachusetts: Vol. 1, Acts and Resolves of the Province of Massachusetts Bay, pp. 183-184; vol. 3 *Id.*, pp. 465-466; vol. 4 *Id.*, pp. 285-286. New Jersey: 1 New Jersey Laws (Nevill), pp. 35-36. Connecticut: 24 George II, (1750), Acts and Laws (to October, 1772), pp. 257-258; Acts and Laws (to May, 1787), pp. 74-77.

[22] As noticed above, the Vermont legislature delegated the power to the magistrates, select men, and constables of the towns where the ferries were located. In Maryland the justices of the several county courts were authorized to grant a license to any inhabitant of the county to keep a public ferry, if said justices were of the opinion that a ferry ought to be kept and established there; and the justices were directed to—

> ascertain in current money the price of ferriage for passengers and horses, and the several kinds of carriages (not allowing any thing for the baggage of passengers) at every ferry by them licensed; and the said justices shall direct how many and what kind of boats shall be kept, and what number of ablebodied and skillful hands shall be employed in the boats at every ferry by them licensed; * * * and if any licensed ferry-keeper shall ask or receive, directly or indirectly, more than the price allowed for ferriage, he shall, for every demand or receipt, forfeit twenty shillings current money; * * * 1 Maryland Laws (Dorsey), p. 173.

In New York, by an Act of March 8, 1773, the judges and assistant judges of the Inferior Court of Common Pleas for Tryon County were given full power and authority to appoint and settle ferries along the Mohawk River—

Delegation is also found frequently in the laws, rather common then, for the regulation of prices of commodities generally.[33]

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wheresoever the same shall appear necessary for the Ease and Convenience of the said Inhabitants, and to fix and ascertain the Ferriage for Travellers, and their Effects who shall pass the said Ferries, or any of them respectively. * * * 5 New York Colonial Laws, pp. 592–593.

In North Carolina the power to regulate ferry rates was delegated to the justices of each county wherein the ferry lay. North Carolina Laws (Iredell), 1715–1800, p. 391. See also *Id.*, p. 533. A similar Act was passed in New Hampshire on Febr ary 28, 1783, Laws of New Hampshire (1792), pp. 296–297.

[33] By the Act of 13 George II, 1 Delaware Laws (1797), pp. 192, 195, 196—

the Justices of the Peace in the respective counties within this government, during the sitting of the Quarter Sessions in the month of November in each year, are hereby impowered and required to make and settle such rates, prices and orders, on and for all sorts of liquors retailed by all masters and keepers of public houses of entertainment, as aforesaid, within the respective counties of this government, as to them shall appear to be just, meet and convenient; * * *

In North Carolina the General Assembly in 1779 provided (Iredell, *supra* at p. 392)—

That the Justices of each County shall once a Year, or oftener if neces ary, after the first Court to be held after the first Day of January next, rate the Prices of Liquors, Diet, Lodging, Fodder, Corn, Provender and Pasturage, to be taken by Ordinary-Keepers; also the said Justices shall, at the same Time, rate the Prices of such Ferries as sha'l be kept within their respective Counties: * * *

In Georgia by Act of August 14, 1786, XIX, Part 2, Colonial Records of Georgia (Candler), pp. 556–560, the legislature delegated to the Superior Court of the County the power to fix the rates and prices to be paid at taverns for liquor, food, lodging, provender, stablage, and pasturage.

Another interesting type of delegation is that which related to the levying of taxes. It appears not to have been uncommon for the legislature to designate the amount of money to be raised by taxa-

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The Pennsylvania legislature, in 1784, designated certain persons to be Wardens of the Port of Philadelphia and delegated to them power "to form and establish such rules and orders as they, on due deliberation and advisement, shall from time to time think requisite and proper for guarding against" the inconveniences and mischiefs frequently happening for want of order and regularity, in the placing, anchoring, and mooring of vessels in the stream, as well as at the wharves and docks. And penalty was prescribed for the breach of these rules.

In Connecticut the Governor, Council, and Representatives, in general assembly enacted—

> That any Town in this State shall have Authority, in Town Meeting, to make Rules and Ordinances for regulating the Fisheries of Clams and Oysters, within their respective Limits, or the Waters and Flats to them adjoining and belonging, and for Preservation of the same; and to impose such Penalties as shall be thought proper by such Towns, for the Breach of such Rules and Ordinances. *Provided*, That no such Penalty shall exceed the Sum of *five pounds*, lawful Money. Connecticut Acts and Laws (to May 1787), pp. 78–80.

In Georgia by Act of February 27, 1770, XIX, Part 1, Colonial Records of Georgia (Candler), pp. 140–144, the exportation of corn meal was prohibited "until the first day of September next, * * *." But the Governor was authorized to lift the prohibition upon its appearing to him that there was a sufficient quantity of corn fully to answer the necessities of the inhabitants. And it was further provided that whereas it might be necessary after September 1 to prohibit exportations at a time when the General Assembly "cannot without manifest inconvenience be called together" the Governor, with the advice and consent of the Majesty's Council, was authorized after September 1 to prohibit export of corn meal when the market price exceeded 2 shillings 6 pence

tion and to fix the sum due from the several counties in the State but to leave it to the discretion of the county commissioners and assessors to fix the quota for each township in the county and to distribute the levy upon the taxable subjects within the township.[34]

It seems also not to have been unusual for the legislature to fix the size and weight of such commodities as bread, sometimes directly, sometimes through some delegated agency.[35]

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per bushel. By Act of July 30, 1783, XIX, Part 2, *Id.* pp. 243, 247–248, this Act was continued, but it was declared that the Governor could lay an embargo only in a particular emergency and that the legislature should be convened as soon as thereafter as agreeable to law in order to pass on the expediency and propriety of continuing the embargo.

[34] See Act of March 27, 1778, Chapter LIX, Pennsylvania Laws (McKean), p. 118; see also *Id.*, pp. 198, 239; Act of June 22, 1782, Chapter CCCXVI, 2 New Jersey Laws (Wilson), pp. 273–287. See also *Id.*, pp. 377–380.

[35] In Delaware, for example, by act of 13 George II, 1 Delaware Laws (1797), p. 185, and 15 George II, *Id.*, p. 251, the Lieutenant Governor and General Assembly provided that all soft or loaf bread baked or to be baked for sale within the counties of Kent and Sussex should be either white, middling, or brown and that—

> the Justices of the Court of Quarter-Sessions for the said counties respectively, shall and are hereby impowered and required, from time to time, at their Quarterly Sessions of the Peace, to settle and appoint the size and weight of the several sorts of bread which shall be baked for sale * * *.

(The language of the two Acts is substantially the same; the first related to the town of Newcastle, and the second to the towns of Dover and Lewes.) In South Carolina in 1749, a very detailed table of the size of bread in pounds, ounces, and drams, with the price "by the Hundred, or Five

It was, no doubt, this familiarity with the practice of delegation that caused the argument in *McCulloch* v. *Maryland*, that a privately owned corporation was not a necessary and proper means of carrying express or implied powers of government into execution, to fall upon deaf ears. The assumption underlying the decision of that case is that the Bank of the United States was an instrument to which certain governmental power could properly be delegated. Marshall boldly declared (4 Wheat. 316, 408):

> The power being given, it is the interest of the Nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution, by withholding the most appropriate means.

And he said (p. 421):

> * * * the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are

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Score Pounds, in current Money," was enacted into law. South Carolina Public Laws (Grimke), pp. 219–221. However, in 1784 the power to regulate the price and size of bread in the city of Charleston was vested in the City Council of that city. *Id.*, pp. 346–347.

plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

And all arguments that the legislature might not delegate to the bank the power to set up branches to which it could further delegate some of the power and immunities of the Government [36] were

[36] In the argument against the bank the power of Congress to delegate to the directors of the bank the legislative power to establish branches was challenged (pp. 334–337). The forcefulness with which the contention was urged is evident from the following excerpts:

"It is undoubtedly true, that these branches are established with a single view to trading, and the profit of the stockholders, and not for the convenience or use of the government; and therefore, they are located at the will of the directors, who represent and regard the interests of the stockholders, and are such themselves. * * * It is true, that, by the charter, the government may require a branch in any place it may designate, but if this power is given only for the uses or necessities of the government, then the government only should have the power to order it. In truth, the directors have exercised the power, and they hold it, without any control from the government of the United States; * * *. A most extravagant power to be vested in a body of men, chosen annually by a very small portion of our citizens, for the purpose of loaning and trading with their money to the best advantage! * * * But if these branches are to be supported, on the ground of the constitutional necessity, and they can have no other foundation, the question occurs, who should be the judge of the existence of the necessity, in any proposed case; of the when and the where the power shall be exercised, which the necessity requires? Assuredly, the same tribunal which judges of the original necessity on which the bank is created, should also judge of any subsequent necessity requiring the extension of the remedy. Congress is that tribunal; the only one in which it may be safely trusted; the only one in which the states

brushed aside by the following language (pp. 424–5):

> After the most deliberate consideration, it is the unanimous and decided opinion of this court, that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land.

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to be affected by the measure, are all fairly represented. If this power belongs to congress, it cannot be delegated to the directors of a bank, any more than any other legislative power may be transferred to any other body of citizens: if this doctrine of necessity is without any known limits, but such as those who defend themselves by it, may choose, for the time, to give it; and if the powers derived from it, are assignable by the congress to the directors of a bank; and by the directors of the bank to anybody else; we have really spent a great deal of labor and learning to very little purpose, in our attempt to establish a form of government in which the powers of those who govern shall be strictly defined and controlled; and the rights of the government secured from the usurpations of unlimited or unknown powers. The establishment of a bank in a state, without its assent; without regard to its interests, its policy or institutions, is a higher exercise of authority, than the creation of the parent bank; which, if confined to the seat of the government, and to the purposes of the government, will interfere less with the rights and policy of the states, than those wide-spreading branches, planted everywhere, and influencing all the business of the community. Such an exercise of sovereign power, should, at least, have the sanction of the sovereign legislature, to vouch that the good of the whole requires it, that the necessity exists which justifies it. But will it be tolerated, that twenty directors of a trading corporation, having no object but profit, shall, in the pursuit of it, tread upon the sovereignty of the state; enter it, without condescending to ask its leave; disregard, perhaps, the whole system of its policy; overthrow its institutions, and sacrifice its interests?

> The branches, proceeding from the same stock, and being conducive to the complete accomplishment of the object, are equally constitutional. It would have been unwise, to locate them in the charter, and it would be unnecessarily inconvenient, to employ the legislative power in making those subordinate arrangements. The great duties of the bank are prescribed; those duties require branches; and the bank itself may, we think, be safely trusted with the selection of places where those branches shall be fixed; reserving always to the government the right to require that a branch shall be located where it may be deemed necessary.

The practice of delegating some part of the sovereignty is thus old and approved. And many years ago the practice began of delegating such legislative functions as rate-making, guided only by such standards as "reasonableness," "nondiscrimination," and "public convenience and necessity." When these delegations first began, these words were almost without content and their settled meaning of today has been the result of the exercise of the delegated power rather than the result of any experience that existed before its delegation.

In implying a limitation after one hundred and fifty years, great care should be taken to distinguish between an attempt to *alienate* power and an attempt to *delegate* power. Delegation of authority, which is subject to supervision and to recall, if abused, is quite another matter than an attempted alienation which would work a modification of the constitutional system.

This recent doctrine of strict non-delegability, itself one of most nebulous content and extent, and creating grave doubts as to what functions can be delegated, simply results in the centralization in Congress of work essentially administrative that could far better be performed if delegated. A doctrine which tends to require a great volume of administrative work to be half done by a central legislative authority rather than to permit the same volume of work to be well done and well considered by a more decentralized administrative authority, is to be asserted with definiteness and applied with caution.

A clear statement of the proper rule would not only relieve the Government from the necessity of defending each law in which Congress imposes administrative duties upon an executive officer against attempts to extend the principles stated in the *Schechter* and the *Panama* cases to fantastically restrictive extremes. It would also enable the Congress in drafting laws to keep within the still vague limits of its power to delegate and yet, at the same time, avoid frustrating democratic government by rules so rigid as to preclude effective administration.

With the growing complexities of life and the consequently expanding functions of government, the doctrine of strict non-delegability is the most potent force for insuring inefficiency and incompetence in the process of public administration. In dealing with many of the complicated situations encountered by modern government, attempts to express standards assured of conformity with the

apparently prevailing rule are met with the difficulty that if standards existed which could be suitably expressed according to that rule the delegation might not be necessary. That precisely expressed standards to be workable must in many cases be the product of experience is more strikingly evident now than it was when "public convenience and necessity," then undefined by experience or previous application, was deemed a sufficiently explicit guide to sustain the administration of laws. In those days the objectives were broadly stated and the guides to their achievement phrased in general language. That was considered sufficient. On that structure a highly successful government was established and conducted without serious abuse of power. Modern conditions require a return to this older rule, so clearly perceived and declared by Marshall, or a clear indication that it has not been abandoned.

But even under a strict rule of non-delegability there could be no serious doubt that this Act supplies the Secretary with standards wholly adequate to guide his determination of the markets to which the regulations imposed by the Act shall apply. Nor can there be serious doubt that the Act does not contain any unconstitutional delegation of legislative power to tobacco growers.

B. *The Tobacco Inspection Act does not delegate legislative power to the Secretary of Agriculture*

Section 5 prescribes the standard to guide the Secretary in the designation of markets where in-

spection is to be required. The standard is clear and unequivocal. Its objectives are apparent from the language used. It is obviously capable of practical administration and is capable also, if necessary, of judicial review to determine whether the power delegated has been properly exercised.

It is evident from a reading of the section, and from the report of the committee of the House of Representatives on the bill, Appendix, p. 98, that Congress intended that the Act should apply eventually to all auction markets where tobacco is sold into interstate commerce and where such inspection is not objectionable to more than a third of the growers affected. It is equally clear that Congress was aware of the fact that inspection could not be provided for all such markets immediately upon the Act becoming effective; that adequate competent personnel was not available for that to be done, that sufficient additional personnel could not be made available in time to extend the service to all markets in the first year or for some time thereafter, and that other practical factors also would prevent inspection being made immediately available on all markets. Accordingly, Congress did not make the futile and wasteful gesture of appropriating sufficient money to finance inspection in the first year on all markets but rather kept the appropriation within the amount deemed necessary to make such competent inspection as could be provided available to as many growers as possible. The standard prescribed for selection of

the markets where inspection is to be required is consistent with this situation which Congress faced and specifically provided for.

It is apparent from Section 5 that the Secretary is to determine first, whether tobacco sold on any market moves in interstate or foreign commerce. He must determine whether more than a third of the growers who in the previous year sold tobacco on the market object to the general requirement of free federal inspection on the market. He must determine also upon which of the markets inspection could be made available to the largest number of growers using the facilities available. This last determination is required only in case sufficient competent inspectors are not available to provide such inspection on all markets in a type area, or if, for other reasons, the Secretary is unable to provide such inspection at all markets in the type area.

These are all facts which the Secretary can readily determine. The means of determining them are readily available. The Act itself provides, in the requirement of a referendum, a useful source of information to aid the Secretary in determining upon which market the most producers could be served with the available facilities. There is nothing vague or indefinite about these standards. They are far more definite and precise than the standard of "public convenience, interest, or necessity" found in the Radio Act of 1927, 44 Stat. 1162, 1163, which was held valid in *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266.

They appear elaborate when contrasted with the standard of "public interest" which has been sustained in several cases involving the Interstate Commerce Commission. *Avent* v. *United States*, 266 U. S. 127; *New York Central Securities Corporation* v. *United States*, 287 U. S. 12. They are clearly as definite as the standard for making rules and regulations "to improve and protect the forest within the reservation, and to secure favorable conditions of water flows," held valid in *United States* v. *Grimaud*, 220 U. S. 506.

Obviously, it would have been impractical for Congress to require the Secretary to bring to Congress for its specific action each determination required to be made under this section such, for example, as the question whether, in view of the facilities available, more growers could receive the benefits of inspection on one market than on another, or whether the amount of tobacco available for inspection on a market justifies the cost of the service, or whether the facilities available are sufficient to continue the service in two designated markets or only one. These are simple questions of practical administration, not questions of legislative policy. The legislation could not have been made effective if Congress had been required to act upon each of them. There is no principle of due process or of the doctrine of separation of powers which requires that Congress retain the onerous duty of making such detailed factual determinations as these. It is difficult to imagine how, within the limits of prac-

tical government, Congress could have pointed out more clearly what it intended the Secretary to do in administering this phase of this law. We submit, that the provisions for the designation of the markets subject to inspection are safely within the limits of the long established rule that Congress may delegate the duty of determining facts and applying a law to the situation disclosed by those facts if it is a situation to which the law is apparently intended to apply. Although the Secretary is authorized to designate markets for inspection, it is clearly evident that he is not given unrestrained power to select any market he sees fit.[37]

C. *The Tobacco Inspection Act does not delegate legislative power to tobacco growers*

Section 5 provides that before he designates a market for inspection the Secretary shall conduct a referendum among growers who sold tobacco on

[37] It may be said that the Act merely authorizes the Secretary to designate the markets upon which the inspection is to be applied but does not require him to do so. The language of the section is evidently mandatory. It is well settled that the word "authorized," when directed to an administrative officer in defining his duty, means "directed." *United States Sugar Equalization Board* v. *P. De Ronde & Co.*, 7 F. (2d) 981 (C. C. A. 3d); *United States* v. *Cornell Steamboat Co.*, 202 U. S. 184. Moreover, Section 5, read in its entirety, discloses clearly that the Secretary is required by Congress to proceed as rapidly as the facilities available will permit, to designate all interstate markets on which not more than one-third of the growers object to inspection, commencing with the market on which, with available facilities, he can make inspection available to the greatest number of growers.

the market the previous year to determine their attitude towards inspection. Unless two-thirds of the growers voting favor the inspection, he is not to designate the market even though it meets the other specified requirements for designation.

Petitioners claim that this provision "delegates to a majority the power to pass compulsory legislation affecting a minority" (Pet. Br. p. 29). They insist that it enables the growers to "impose" the inspection on a particular market. Clearly the law does not so provide. Congress imposes the regulation, tells the Secretary how to select the markets, and merely adds that he shall not impose it if a specified proportion of the growers voice objection to it. They can initiate no action whatever which could lead to the imposition of inspection on a particular market.

The petitioners suggest no constitutional obligation resting upon Congress to provide that a commercial regulation, however desirable, shall be forced upon unwilling beneficiaries. Congress, having the power to impose the requirement, and having provided for its imposition, need not have made this concession. It could have imposed the regulation without regard to the sentiment of the growers. But in providing that the Secretary should ascertain their attitude and should not impose the regulation if that attitude is adverse, Congress has not relinquished any of its legislative power. It has merely refrained from exerting that

power as rigorously as it might have done. No delegation of legislative power is involved.

No action of the growers could require the Secretary to designate a market which does not meet the other requirements. On the other hand, Congress has expressed a clear intention that the inspection *shall* apply to all markets which do meet such requirements *unless* the growers object. The petitioners are not subjected to the will of the majority of the growers voting because the Act does not authorize the majority either to determine what the law shall be or to determine that it shall apply to any market to which Congress has not clearly indicated it intends it to apply. The most that can be said with regard to the referendum is that the fact that two-thirds of the growers voting favor the inspection is one of several facts which the Secretary must find as a condition precedent to the law becoming effective on any market. The establishment of such a condition is not a delegation of legislative power.[a]

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[a] Furthermore, the referendum serves a distinct practical purpose. It indicates definitely in advance potential difficulties of enforcement and points out the existence of objections to the proposed regulation which in the light of protests expressed through the referendum may be adjusted by subsequent legislation so that the regulation may be more useful and more effectively administered. The mere provision for an expression of opinion by persons affected by regulatory legislation is not inconsistent with any recognized principle of our form of government. Moreover, it gives extraordinary assurance of the reasonableness of the regulation. (See p. 86, *infra*.)

A requirement that the Tariff Commission must make investigation of differences in cost of production as a necessary preliminary to changes by the President in duties was held in *Hampton & Co.* v. *United States*, 276 U. S. 394, not to be an unlawful delegation of power to the Tariff Commission, the Court pointing out (p. 405) that the Commission did not fix the duties. The Court there strongly asserted the power of Congress to require, as a condition of a law becoming effective that it be ascertained whether persons affected by it favor the regulation, saying (p. 407):

> Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an Executive, or, as often happens in matters of state legislation, it may be left to a popular vote of the residents of a district to be effected by the legislation. While in a sense one may say that such residents are exercising legislative power, it is not an exact statement, *because the power has already been exercised legislatively by the body vested with that power under the Constitution, the condition of its legislation going into effect being made dependent by the legislature on the expression of the voters of a certain district.* [Italics supplied.]

Similarly in *Cusack Co.* v. *City of Chicago*, 242 U. S. 526, an ordinance was held valid which pro-

hibited the erection of billboards, unless owners of the majority of the property in the block in which the billboard was to be erected consented. There, as in this case, the legislative authority imposed the restriction, conditioned, however, upon its being relaxed if it were found that those primarily benefited by it preferred that it not be imposed.

The situation here, as in the *Cusack* case, is completely different from that involved in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, in *Washington ex rel. Seattle Trust Co.* v. *Roberge*, 278 U. S. 116, and in *Eubank* v. *City of Richmond*, 226 U. S. 137. In the *Carter* case the statute provided that the consensus of the majority should bind the dissenting minority and have the force of law. In the *Roberge* case, the ordinance permitted a building, not shown to be objectionable, to be constructed only if the consent of neighboring property owners was obtained. There was no legislative determination that the building should not be built but rather a contrary expression. Accordingly the neighbors had the power to prohibit the building, not to relax a prohibition expressed by the ordinance. In the *Eubank* case, the officials were required to establish building lines detrimental to the property of nonassenting property owners whenever owners of two-thirds of the property in any block requested them to do so. The regulation was left to the capricious, uncontrolled whim of neighboring property owners.

In each of those cases the vote of the majority was effective to impose the regulation, uncontrolled by the legislature or by any executive officers. Here, on the other hand, the Congress has imposed the regulation, and the attitude of the growers is merely a fact to be determined before the power already exercised by Congress shall become unconditionally effective.

Even where private individuals are enabled to call the regulation into operation, regulation under a general legislative enactment has been sustained. Thus in *Doty* v. *Love*, 295 U. S. 64, this Court sustained a Mississippi statute which permitted the reopening of closed banks upon terms proposed by three-fourths of the creditors provided the Superintendent of Banks and the Court of Chancery approved the plan. The Court pointed out that such a provision is not an unlawful delegation of power to the majority creditors, although in that case the creditors had the right to initiate the plan. (The growers have no such right here.) As the Court indicated, in such a case the dissenting creditors are not subject to the will of the assenting three-fourths but the superintendent and the court, who were required to approve the plan, are charged with the duty of making the determinations essential to its becoming effective. See also *Booth* v. *Indiana*, 179 Ind. 405 (1913); affirmed on appeal, 237 U. S. 391.

It has already been pointed out (pp. 60–63, *supra*) that in *McCulloch* v. *Maryland*, *supra*, this Court

found no difficulty with the delegation to the directors of the bank of the power to select the places where branches should be established, although it had been contended forcefully (pp. 335–337) that the power to select the location of branches could not be delegated to the directors of a bank "any more than any other legislative power may be transferred to any other body of citizens."

We have found no cases in which this Court has invalidated a law on the ground of unlawful delegation where, as in this case, the legislation has imposed a regulation and provided merely that it shall not be effective if those primarily affected disapprove its application. In this case the growers cannot impose their will on anyone. Clearly this Act involves no unlawful delegation of law-making power.

IV

THE PETITIONERS HAVE SHOWN NEITHER ANY DEPRIVATION NOR ANY THREAT OF DEPRIVATION OF THEIR PROPERTY, NOR ANY INTEREST SUFFICIENT TO PERMIT THEM TO RAISE QUESTIONS OF DUE PROCESS OR TO OBTAIN INJUNCTIVE RELIEF OR A DECLARATORY JUDGMENT

The petitioners contend that the Tobacco Inspection Act is discriminatory in its operation because it is effective only with respect to auction markets and as to these, only with respect to certain markets designated by the Secretary. They assert that these circumstances threaten them with

damage, and that the provisions for selection of markets are unconstitutionally discriminatory.

This argument presupposes that the petitioners have some legal interest to which injury could conceivably be sustained through the operation of this statute. The record is clear, however, that no rights of the petitioners are affected by this Act and that no property of theirs has been damaged or is threatened with damage.

The inspection provided for, and all action by the Government with respect to it, occurs while the tobacco is in the unqualified ownership of the grower and while the petitioners have no legal interest in it except perhaps that of a bailee for hire. Petitioners' conception of their relationship is stated in their brief (Pet. Br. p. 23):

> The warehouseman has the custody of the tobacco and offers it for sale *as the agent of the grower*. [Italics ours.] After the auction sale has passed each basket of tobacco, the grower has the privilege of confirming or rejecting the sale, and until he confirms the sale the tobacco belongs to him and is in his actual possession.[1]

It is clear, therefore, that this statute does not affect tobacco which is the property of the petitioners and that their effort here is not to protect any property right in the tobacco, because they have none.

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[1] In their brief this sentence is italized.

Their interest lies rather in the compensation which they receive for their services in connection with the sale of such tobacco, a flat price per pound plus a small commission on sales—in protecting allegedly probable future commissions as agents of the growers. Not only do they fail to show that they have any present right or interest in such future commissions but it is clear from the record that the Act does not threaten even that expectancy of commissions. On the contrary, it tends to enhance the volume of business received by warehousemen whose markets have the inspection service.

A. *Petitioners show no vested right in any future commissions*

However probable their receipt of commissions from the sale of tobacco may be, they are purely conjectural. The petitioners fail to show the existence of any contract for future services which would give them a legal right at any time prior to the completion of a sale to a commission on any tobacco. On the contrary, they themselves claim that growers are free to sell their tobacco at any warehouse (Pet. Br. pp. 10, 31). The petitioners have established no property right in future commissions which might be diminished, even if their most gloomy predictions concerning the effect of inspection should have proved to be true.

B. The Tobacco Inspection Act takes nothing from such rights or opportunities as the petitioners may have to earn commissions

The Act does not affect the petitioners' rate of commission or the basic compensation. They are free to sell any tobacco properly graded. Their relationship to the grower is exactly the same under the Act as it was before the Act. The only difference in their situation is that under the Act they will be agents of growers who are accurately informed of the grade of their tobacco and are in a position to know the price it ought to bring; whereas, under the existing practice, they are the agents of uninformed growers less able to protect their interests. It can hardly be contended that the petitioners, claiming to be agents for the growers, have a vested property interest in their principals' lack of information or that they are damaged by their principals' being better qualified to protect themselves. It would seem that their interests as agents for the growers would be the opposite of those they appear to claim.

Moreover, the evidence fails to show any threat that the petitioners' commissions would have been diminished by the operation of the Act. Their effort to show damage is directed along two lines. *First,* they claim that the requirement of inspection deflects from their warehouses business they might normally receive and that they would be less likely, if this Act applied to them, to become the

chosen agents of growers than are warehousemen on markets nearby which may not have been designated. The evidence clearly shows this claim to be unfounded in fact. *Second*, they claim that the required inspection is likely to result in diminished prices to the growers selling on inspected markets and that therefore their warehousemen's commissions will suffer a proportionate reduction. The evidence likewise fails to support this claim.

With respect to the claim that the requirement of inspection deflects business from their warehouses, it is merely necessary to point out that although in previous years they had enjoyed substantially more than half of the business on the Oxford market throughout the whole marketing season, and although for the first three months of the 1936–1937 season, when inspection was first in effect, they continued to enjoy a similarly preponderant part of the business on the Oxford market, their share of the business dropped off sharply after the temporary injunction was issued in November 1936.[29]

[29] The following table introduced at the trial (R. 77) shows the petitioners' proportion of all sales on the Oxford market each month during the 1935–1936 marketing season as well as during the 1936–1937 season. The temporary injunction was issued November 5th of the latter marketing season.

Complainants' Percentage of Total Sales during the 1935–1936 Marketing Season		Operations for the Same Warehousemen during the 1936–1937 Season
59.2%	September	61.8%
63.0	October	57.6
60.5	November	57.7
63.7	December	52.8
62.6	January	49.0

During November the entire market was congested, and on five out of the fourteen days between November 5th and Thanksgiving the market was "blocked"—more tobacco was offered than could be sold during the sales hours that day (R. 68, 72, 73). While this congestion persisted growers could not readily shift from the petitioners' four uninspected warehouses to the three inspected warehouses of non-complaining warehousemen. However, when the congestion on the market diminished after November, tobacco was moved freely by growers from petitioners' warehouses to warehouses where the benefits of free government grading and inspection were available (R. 87). This decrease in the petitioners' volume of business after government inspection at their warehouses was enjoined is particularly significant in contrast to their relatively constant share of the sales for the previous year. The evidence is clear that although the petitioners, having more facilities, customarily had a larger share of the business on the market than the non-complaining warehouses, and maintained their advantage while all warehouses had inspection, they lost much business to the inspected warehouses after the injunction, because inspection was no longer available at their warehouses. In the light of such evidence their claim that the Act threatened them with loss of business, and therefore loss of probable commissions, is plainly unproved.

They also fail to prove their second claim, that the act threatened their commissions because, even

though the inspection might not have diminished their volume, or even though it might have increased it, it would have resulted in lower prices to those growers who might still continue to patronize their warehouses. They attempt to prove this by a curiously delusive calculation. They show merely that the *average* prices received on their four uninspected warehouses during the *entire* three months period after the injunction was issued were higher than the average prices received during that period on the three inspected warehouses on the Oxford market. They ask the court to conclude from this fact alone that if inspection had been effective at their warehouses during that period, they would have lost commissions on the whole quantity they sold during that time, proportional to the differential in this average price. Obviously these figures prove nothing of the sort. They do not show that the prices paid at their warehouses for any particular grade of tobacco during that period were higher than the prices paid for comparable grades at the inspected warehouses. Nor do they show that this difference in the *average* prices resulted from or was connected in any way with the government inspection. This average price has no significance whatever as affirmative proof of threatened loss. The average figure is deceptive. The reasons for the difference in *average* prices, and the error in the conclusion which petitioners would have the Court draw from it are apparent from a consideration of

the shift of business from petitioners' warehouses to the inspected warehouses during the latter two months of the period, together with the downward shift in the total volume of business and in daily average prices on the market from the beginning of the period to the end. The markets were crowded and large quantities of tobacco were sold during November (R. 72, 73, 94). The average prices are higher then than they are later in the marketing season (R. 91, 93, 94). Because the markets were crowded the petitioners' four warehouses retained substantially more than half of this large volume, high price business done on the market during the first month after the injunction was issued. Thereafter their part of the total business declined sharply so that they had a much smaller, and the inspected warehouses a correspondingly larger proportion of the later low-priced business. The combined effect of these shifts is obvious. By using the whole three-month period the average is weighted heavily with the large volume of high priced sales petitioners enjoyed during the period before growers were free to shift from their warehouses. Inevitably, their average was higher, but it was higher because they had such a relatively small share of the low-priced business transacted after the lack of inspection at their warehouses drove the producers to the inspected warehouses. It is upon this evidence and this alone that their whole claims of threatened damage rests. Clearly it does not prove that by en-

joining the inspection they prevented lower prices to their patrons and averted a threatened loss of commissions. On the contrary, it merely emphasizes the uncontested fact that they lost business after they excluded inspection from their warehouses.

In summary the petitioners have failed completely in this case to show that this act deprived them of any property, or threatened to deprive them of any property, or even threatened to deprive them of a conjectural expectancy. Instead, the evidence is clear that had they not resisted compliance with it they would have benefited.

Having failed to show that they are injured by this law the petitioners cannot be said to be deprived by it of either constitutional rights or property. *Cusack Co.* v. *City of Chicago, supra; Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531.

C. *The Tobacco Inspection Act is not unconstitutionally discriminatory*

Since the petitioners have failed to show any damage or threat of loss from the Act it is unnecessary to consider whether, if such damage had been shown it would have been attributable to unconstitutional, arbitrary, or unreasonable discrimination resulting from this Act. It may be worth while to point out, however, that the provision for the selection of markets for inspection and grading is thoroughly reasonable, is not arbitrary, and does not

infringe the due process clause of the Fifth Amendment.

It is clear that a Federal regulation of commerce is not *per se* a violation of the due process clause merely because it applies in some places and not in others. There is no provision in the Constitution which requires Congress to exercise its power to regulate interstate commerce with complete geographical uniformity. See *Clark Distilling Co.* v. *Western Maryland Railway Co. et al.*, 242 U. S. 311, 326, 327; *Cooley* v. *Board of Wardens et al.*, 12 How. 298, 318. See also *In re Rahrer*, 140 U. S. 545; *Kentucky Whip and Collar Co.* v. *Illinois Central Railroad*, 299 U. S. 334; *Whitfield* v. *Ohio*, 297 U. S. 431, 434. "The Fifth Amendment unlike the Fourteenth has no equal protection clause." *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 584. The due process clause may prohibit injurious discrimination, but it does not require the same equality of classification as does the equal protection clause of the Fourteenth Amendment. "Legislation by the Congress, which is subject to restraints less narrow and confining." *Steward Machine Co.* v. *Davis, supra.* See *Quong Wing* v. *Kirkendall*, 223 U. S. 59; *LaBelle Iron Works* v. *United States*, 256 U. S. 377. The due process clause affects a regulation which applies in some places and not in others only if the selection so discriminates against the persons in the area regulated as to cause them injury. If they are not injured, they cannot escape the regulation

on the ground that it is merely inoffensively selective. *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139. *Cusack Co.* v. *City of Chicago, supra.*

Furthermore, the provision of this Act requiring inspection initially on only a limited number of markets, if it be at all discriminatory, is nevertheless thoroughly reasonable. As we have pointed out heretofore, Congress found it impossible to provide for immediate inspection of all markets. Accordingly, it provided for inspection first, on only those markets where the largest number of growers could be benefited with the available facilities, contemplating that the service should be extended as rapidly as feasible to cover the entire field. It has never been assumed that the practical procedure of putting a statute into effect gradually instead of all at once, would in itself make the statute unconstitutional. Clearly, if there is discrimination here, it is discrimination which hurts no one and which is based on reasonable practical grounds.

The selection of the Oxford market by the Secretary of Agriculture pursuant to this policy was not an arbitrary choice. Growers selling on that market had been accustomed to having their tobacco graded by Government inspectors for a small fee under the service previously provided under the Farm Products Inspection Act (7 U. S. C. 492). It was determined that, being acquainted with the service, they were more likely to use it in large numbers than growers on other markets unacquainted with it. The fact that 94% of those who

voted in the referendum on the Oxford market favored the designation of that market strongly confirms that view.

Furthermore, this overwhelming majority of the growers voting in favor of inspection is a guarantee of its reasonableness. Congress is undoubtedly justified in ascertaining the sentiment of those to be regulated as to whether a regulation is suitable to them. Their opinion that they do not favor a regulation would fall far short of establishing that it is unreasonable. There might be many reasons why they prefer not to have it. But the opinion of the only people to be regulated that a regulation is desirable ought definitely to preclude any judgment of a court that such a regulation is arbitrary, capricious, or unreasonable. The only persons affected by this Act are the tobacco growers. It is they who cannot sell at auction unless they submit to grading and inspection. And it is they who have voted by a large majority in favor of the restraint thus put upon them. It takes an unusual measure of intellectual hardihood for a commission merchant to argue that a restraint upon his principals is unreasonable or arbitrary which the principals themselves have voted by so large a majority to accept. In *Borden's Co.* v. *Ten Eyck*, 297 U. S. 251, this Court said (p. 263):

> The appellant cannot complain if, in fact, the discrimination embodied in the law is but a perpetuation of a classification created and existing by the action of the dealers.

it was thus recognizing the function of the opinions and practices of the people in making the law. There could be no better assurance that a regulation is reasonable than a preponderant vote favoring it cast by those regulated.

This test of reasonableness, intended to be an assurance against capricious or arbitrary imposition, is now sought to be turned by a series of legalistic arguments into constitutional infirmity by those commission merchants who seem to be of the opinion that their principals would not know when they were imposed upon.

The device is not a delegation of legislative powers, nor is it an interference in any way with the rights of the commission merchants. It is merely a safeguard against arbitrary application of the Act to markets where it would be unsuitable.

In summary, there is no constitutional requirement that a commerce regulation be absolutely uniform; there is nothing to show that the application of required inspection to the Oxford market under this Act caused injury to anyone, and particularly not to these petitioners. Moreover, there is nothing to show that it was unreasonable, arbitrary, or discriminatory, and much to show that it had none of these infirmities. There is a complete failure to show that this Act or its application to these petitioners violates the Fifth Amendment to the Constitution.

D. *The petitioners have failed to show the irreparable injury necessary to warrant the granting of equitable relief*

It is clearly evident from the previous discussion, pp. 75–83, *supra,* that the petitioners have completely failed to show that they have been damaged by this Act or that they were threatened with damage.

It is well established that the constitutionality of a statute cannot be attacked by one who fails to show that he has sustained or is in immediate danger of sustaining irreparable injury as a result of its enforcement. *Massachusetts* v. *Mellon,* 262 U. S. 447; *Spielman Motor Sales Co.* v. *Dodge,* 295 U. S. 89; *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497. The Court states the rule in *Massachusetts* v. *Mellon,* 262 U. S. at 488:

> We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. * * * The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

The burden of proof is on the complaining party to establish the fact of injury. *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, 209. The petitioners have clearly failed to sustain that burden in this case. They have failed to show any property right which is damaged or to which damage is threatened by this Act. They have even failed to show any threat of damage to the inchoate expectancy of future commissions. It is clear from the record that if they had complied with this Act, they would have avoided damage which they suffered through their resistance. They have shown no basis for injunctive relief against its provisions. The injunction they procured protects them only against a non-existent danger or, as events have proved, causes them damage.

In these circumstances, the only remaining ground upon which their assertion of a threat of damage may rest is the threat of prosecution for the violation of this Act, compliance with which would cause them no injury. We know of no case which gives to persons contemplating a criminal act the right to invoke the jurisdiction of a court of equity to prevent enforcement of that act when their compliance with it could do them no damage. The rule is clearly the other way. *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497, 500. See also *In re Sawyer,* 124 U. S. 200, 209, 211; *Davis & Farnum Manufacturing Co.* v. *Los Angeles,* 189 U. S. 207, 217.

The vicious results of such a doctrine are readily apparent. Criminal law would be enforced through

the defense of injunction suits. The cases in which courts of equity intervene to forestall enforcement of criminal penalties are cases where the person attacking the statute asserts and proves that he is faced with irreparable loss if he complies. If he may comply without damage, no reason is apparent why, if he wishes to test the validity of the penal provision, he should not raise the question by submitting to prosecution. No one has an inherent right to nullify an Act of Congress which does not hurt him, merely because he doesn't like to comply. That is all the petitioners ask here. They would have no right to equitable relief even if they had shown that they were threatened with prosecution.

But even their allegation of threat of prosecution has not been sustained. They allege such threats (R. 10, 14). The threats are denied (R. 58, 59, 61). The petitioners offered no proof that threats had been made. The allegation has not been proved and must be deemed to have been abandoned. On the state of the record they have failed to show any threat of immediate injury even from noncompliance. Accordingly they are left without even this asserted basis for equitable relief. Cf. *Spielman Motor Sales Co.* v. *Dodge, supra;* See *Ex parte La Prade,* 289 U. S. 444; *State of California* v. *Murray H. Latimer et al.,* No. 13, Original, October Term 1938, decided December 5, 1938.[39]

[39] Furthermore, inasmuch as petitioners have failed to prove threats by the individual defendants, this becomes, in substance, a suit against the United States which has not consented to be sued, and has not been made a party.

E. *The petitioners have shown no basis for a declaratory judgment*

The circumstances pointed out immediately above indicate that no actual controversy exists between the petitioners and the respondents within the meaning of the Declaratory Judgments Act. Petitioners say that they have alleged a controversy, and that the respondents have admitted it. It is apparent, in view of the failure of the petitioners to prove either a threat of prosecution or a threat of damage from compliance, that there exists not a justiciable issue but merely a difference of opinion between the petitioners and respondents as to whether the Tobacco Inspection Act is constitutional. See *Electric Bond & Share Co. et al.* v. *Securities & Exchange Commission et al.*, 303 U. S. 419, 443; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 324. See also *Massachusetts* v. *Mellon* (*supra*).

It might be said that the petitioners may have an interest adverse to that of the respondents in asserting their right to violate an Act with which they might comply without injury. The same might be said of any person anxious to violate with impunity any statute defining an offense and prescribing criminal penalties. We do not believe the Declaratory Judgments Act was intended to facilitate avoidance of regulation, beneficial to some and harmless to those who seek to avoid it, or to open the Federal courts to suits to test the constitution-

ality of legislation commenced by persons who sue for a declaration merely because they disagree with the policy such legislation makes effective. It has never been so applied. We submit that it should not be so construed.

CONCLUSION

The Tobacco Inspection Act as applied to the Oxford market is a valid exercise of the power of Congress to regulate interstate and foreign commerce. It is also a valid exercise in conjunction with the commerce power, of other powers specifically granted to Congress. It does not violate the Fifth Amendment or any other provisions of the Constitution. Furthermore petitioners have failed to establish either any legal interest entitling them to attack the constitutionality of the Act or to equitable relief, or any justiciable controversy as a basis for a determination under the Declaratory Judgments Act. The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General,

THURMAN ARNOLD,
Assistant Attorney General,

ROBERT K. MCCONNAUGHEY,
Special Assistant to the Attorney General.

DECEMBER 1938.

TOBACCO CLASSIFICATION AND INSPECTION

ne 5, 1935.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

Mr. FLANNAGAN, from the Committee on Agriculture, submitted the following

REPORT

[To accompany H. R. 8026]

The Committee on Agriculture, to whom was referred the bill (H. R. 8026) to establish and promote the use of standards of classification for tobacco, to provide and maintain an official tobacco inspection service, and for other purposes, having held extensive hearing, and having carefully considered same, report thereon with a recommendation that it do pass.

STATEMENT

This bill, which is known as "the Tobacco Inspection bill", provides for two general classes of inspection service. The first and most important is set forth in section 5, wherein the Secretary of Agriculture is authorized under certain conditions to designate markets on which tobacco shall be inspected and certified before sale at auction. The second is embodied in section 6, which provides for inspection, sampling, and weighing upon request of farmers, dealers, manufacturers, or others.

The first provision of the bill, which applies to tobacco sold on what are known as auction markets, has for its objects (1) the grading of the growers' tobacco by Government graders before sale so they will know what grades they are offering for sale, and (2) furnishing the growers with a daily and weekly market news service so they will know what the different grades of tobacco are bringing, and thus put them in position intelligently to accept or reject sales.

In order to understand the real objects of this first provision of the bill it is thought that a short statement of the present auction system of selling tobacco is in order. Tobacco is the only major farm crop which is sold at auction. In many localities, particularly in Virginia, North Carolina, South Carolina, Georgia, Florida, West Vir-

ginia, and Maryland, and in certain sections of Tennessee, Kentucky, Ohio, Indiana, and Missouri there is no other method of selling tobacco available to growers.

Tobacco, under the auction system as now conducted, is sold in baskets containing from 10 to 200 or more pounds. These baskets are placed upon the warehouse floor in long rows and the tobacco is sold to the highest bidder at public auction by the warehouseman, who operates on a fee or commission basis and who is supposed to represent the tobacco grower. The sales are made without the grades of the several lots being first determined and without the grower knowing what the same grades are bringing. The selling is extremely rapid, being at a rate, on most markets, of one basket every 10 seconds. The purchasers are the representatives of the tobacco companies and speculators, commonly called "pin-hookers", who are experts in the grades of tobacco. There are between 60 and 100 grades in a single type of tobacco, and it is not practical for a farmer to familiarize himself with the technical factors on which these grades are based, or to keep informed as to market prices without a definite system of Government grades.

Without any standard or guide, farmers sort their tobacco for market, as best they can, into lots of like quality, color, and length, which they commonly refer to as "grading." However, the farmer has no definite system of grades of his own, and the private grading systems used by the buyers are kept strictly confidential by them, so without Government standards the farmer has no definite guide for sorting his tobacco. Without a definite standard for sorting, or "grading" as the farmers call it, farmers generally are unable to class their tobacco correctly to meet the trade's demand. Buyers frequently refuse to bid on lots of tobacco due to the fact that it is not properly sorted. Improperly sorted lots of tobacco usually command a much smaller price as compared with prices paid for tobacco which is uniformly sorted into lots. Many lots of tobacco after being bought are re-sorted by the buyer into two or three different grades.

The possession of grade and price information by the buyers, and the lack of it on the part of the growers, places the growers under a severe handicap in the marketing of their tobacco and opens the way to abuses and practices by which farmers are victimized. The picture is simply this: Here is a farmer offering his tobacco for sale through a warehouse at the rate of a basket every 10 seconds, at public auction, to the highest bidder, without the grade being first established and without knowing what similar tobacco is bringing. On the other hand we have the purchaser who is an expert judge of tobacco, who has a well-established private system of grades, and who is in possession of all available information with respect to quality and price. It is the thought of the committee that if the purchaser needs an expert in grades in order to protect his interest in the sale the growers should be accorded the same protection.

Since it developed at the hearings on this bill that the farmer sentiment is not unanimous for compulsory grading service in certain districts where the farmers are not familiar with the operation of the service, the committee has incorporated in the present bill a referendum amendment which provides that no market shall be designated by the Secretary unless a majority of the growers voting favor it.

Under the bill as originally worded, it was felt by some that the Secretary would have authority to close markets which were not designated. The present bill includes a committee amendment which clarifies the original language and provides that nothing contained in the act shall be construed to prevent transactions in tobacco at markets not designated by the Secretary or at designated markets where the Secretary has suspended the requirement of inspection or to authorize the Secretary to close any market.

In order to clarify the provisions of section 6 of the bill, the committee adopted an amendment which is included in the present bill, which states that section 6 is intended merely to provide for the furnishing of services upon the request of the owner or other person financially interested in the tobacco to be sampled, inspected, and weighed and shall not be construed otherwise.

It has been assumed in some quarters that in operation this bill would injure the auction system. The committee does not hold this view. It does believe, however, that it would materially improve the position of the grower in the marketing of his crop, and to a marked degree would overcome some of the acknowledged weaknesses of the auction system. The following are given as specific instances:

(1) The wide variation in the price received by growers for the same grade of tobacco. This variation ofttimes runs from 25 to 200 percent the same day on the same market and for the same grade by the same buyer. It is believed that this is due largely to errors in judgment on the part of the buyers, and to the fact that the tobacco has not been graded before sale and the grower therefore does not know when he should reject an offer. If the grower knew the grade and the price it is bringing, he would be in a position to reject a sale if the offer was not in line with the current average for the grade. Under the tobacco-inspection bill the grower would be furnished with this information.

(2) Under the present system speculators, commonly known as "pinhookers", operate on every market. Some warehousemen, although claiming to represent the farmer, also indulge in this practice. These speculators, who are experts in tobacco grades, take advantage of opportunities to buy tobacco at less than its real value. They then resell the tobacco, usually in the same warehouse but at a later date, for a profit. They are able to buy the tobacco at a bargain because the grower does not know the grade. The profit made by the "pinhooker" and the speculating warehouseman rightfully belongs to the grower. It is believed the grading bill would practically eliminate this class of speculators.

(3) Another criticism of the present system is that "warehouse pets"—usually large growers and men of influence—are to be found on every market and receive favored treatment at the expense of less fortunate growers. That is to say, these "pets" stand in with warehousemen and buyers, and usually receive prices for their tobacco in excess of the prevailing price level. Then when the small growers' tobacco is offered for sale the price is hammered down and the small grower receives a lower price in order to pay the "pet" and maintain the average price level.

It is believed that the inspection bill will largely eliminate these evils.

Some of the benefits resulting to the grower under the bill are believed to be—

(a) That the application of tobacco-inspection service would have a marked influence in bringing about a more uniform price for tobacco of like quality.

(b) That the possibility of speculators making large profits by buying tobacco in the auction and reselling it to the buyers would be greatly reduced, and as evidence of this fact speculators generally and some warehousemen strongly oppose the official inspection of tobacco.

(c) That buyers are not so likely to overlook a pile of good tobacco in the auction sale if the standard grade is announced during the sale.

(d) That the standard grade placed on a lot of tobacco together with the daily and weekly tobacco price reports would give farmers a definite guide which can be used by them in determining whether or not to accept bids offered. With such information, a farmer is not likely to accept a bid which is materially below the market price.

(e) That auction warehousemen by using the standard grades and market news quotations would be better able to name an opening bid which would result in tobacco selling for a better and more uniform price.

(f) That the standard grades will serve as a guide to farmers in sorting their tobacco for market. Such grades form the foundation upon which farmers generally can be instructed in the classing of their tobacco, and statistics on the average prices by grades show conclusively the advantages of proper sorting. The larger buying firms have expressed their general approval of educational work along these lines, which would be of benefit to the farmers as well as the buyers.

(g) Where one or more baskets of damaged tobacco appear during a sale, apprehension that there may be more such tobacco frequently restricts bidding on other lots. Since damaged tobacco is officially graded as such, the grade should serve to reassure buyers as to the soundness of other tobacco on the sale.

(h) Similarly any question as to whether tobacco is in safe-keeping order would be largely eliminated by inspection, since all tobacco found upon inspection to be in doubtful keeping order is clearly indicated by the standard grade.

(i) That the standard grade placed on a lot of tobacco by a competent but disinterested person does influence the judgment of buyers, and such grade would ordinarily more truly represent the facts than could be gained through competitive buyers or others.

(j) That when the standard grades are clearly announced in an auction, buyers who do not have sufficient time to make a complete examination of the lot can depend upon the accuracy of the information shown by the standard grade. Therefore, in spite of the speed of the sale, buyers would feel safe in placing their bid.

(k) That when tobacco is sold under improper or unfavorable light the buyers do not have sufficient time to take samples to other portions of the warehouse where the light is suitable for the proper determination of quality and color. Whereas in the case of officially inspected tobacco the graders, who perform their work more deliberately, have time to take such samples to the proper light before making their determinations. Therefore, the standard grade in such a case will serve as a reliable guide to buyers.

(1) That farmers through the general application of tobacco inspection would not be placed in the position of hauling their tobacco to market to find a blocked sale resulting in lower prices, as farmers generally would be advised through market news releases and daily prices as to such conditions.

The Secretary of Agriculture in his report to the committee on the tobacco inspection bill made the following statement:

> The inspection of tobacco by disinterested official inspectors on the basis of uniform standards at the time it is offered for sale is a service which the to acco grower has long needed. As your committee is aware, specific legislation has been in effect for many years providing for the establishment by this Department of standards for grain and cotton and the inspection and classification of those commodities. The Bureau of Agricultural Economics has also been conducting for many years an extensive inspection and grading service for fruits and vegetables, meats, butter, cheese, poultry, eggs, beans, hay, and several other farm products. Although one of our important farm products, it was not until the fiscal year beginning July 1, 1929, that the Agriculture Appropriation Act was amended and a small appropriation made for that Bureau to inaugurate a similar grading service for tobacco. Like all such services it has had to pass through a trial period during which technical and administrative problems could be worked out and during which time its usefulness could be determined. Satisfactory progress has been made and the positive value of the service to growers has been demonstrated.

Attention is also called to the following facts:

The Federal Trade Commission as far back as 1920 investigated the tobacco marketing system and recommended Federal grading. Under date of December 11, 1920, the Federal Trade Commission made a strong recommendation for Federal grading of tobacco, and in its report set forth numerous objections to the present system, among them being the objections above set forth.

Again on December 23, 1925, the Federal Trade Commission filed a report on "The American Tobacco Co. and the Imperial Tobacco Co.," and in this report also strongly urged Federal grading of tobacco. And again on May 14, 1931, the Federal Trade Commission filed a report of an investigation made by it pertaining to tobacco marketing and again strongly urged Federal grading.

COST

This bill places the cost of administration, as to compulsory grading service, on the Government. The reason for this is that tobacco is the only crop the entire domestic consumption of which is subject to taxation. The internal revenue tax on tobacco is one of the most important sources of Federal revenue, but the tobacco tax has a direct bearing on the welfare of the growers. If it were not for the heavy burden of taxes on tobacco, consumption would expand. Therefore, the growers would receive a greater return for the same volume of production, or would have a ready market for a large production. That is to say, the existence of the tax has a restricting influence on the market for tobacco and on the prices received by growers. Attention is called to the fact that the Government derives more in revenue from the taxes on tobacco products than the growers receive for the raw materia', as is shown by the following figures from official sources.

Year	Revenue from sale of manufactured tobacco products (million dollars)	Gross returns to growers from sale of tobacco (million dollars)
	Fiscal year	Crop year
1930	449	[illegible]
1931	444	[illegible]
1932	399	[illegible]
1933	402	[illegible]
1934	425	[illegible]

[illegible] Preliminary.

Under these circumstances the committee believes that the tobacco growers are entitled to special consideration and that they should be furnished inspection, where compulsory grading is required, and market news services for improving their marketing system without cost to themselves.

It has been estimated that the cost of administering the act would not exceed $200,000 during the first year, due to the fact that the service could not be greatly expanded the first year. The cost would increase annually thereafter until all auction markets are covered. Officials of the Department of Agriculture estimate that the total cost of inspection service on all auction markets would not exceed $750,000 which is less than one-fourth of 1 percent of the annual revenue derived by the Government from internal revenue taxes on tobacco.

The bill also provides under section 6 for the sampling, inspection, and weighing of tobacco not sold at auction upon the request of growers, cooperative associations, warehousemen, dealers, or other financially interested persons. This service would be conducted on a voluntary basis upon application of an interested person and could be carried on independently by this Department or in cooperation with States or other agencies. This feature of the bill merely provides permanent legislative authority for the same forms of tobacco-grading service now conducted by the Bureau of Agricultural Economics of this Department.

SUMMARY OF THE PROVISIONS OF THE BILL

Briefly the provisions of the tobacco inspection bill may be summarized by sections as follows:

Section 1 defines the terms "person, Secretary, inspector, sampler, weigher, tobacco, auction market, and commerce." Section 2 is a declaration of Congress regarding the sale of tobacco at auction. Section 3 authorizes (*a*) the investigation of tobacco marketing, and (*b*) the establishment of standards for tobacco. Section 4 authorizes the demonstration of tobacco standards by distributing samples and otherwise.

Section 5 authorizes the designation of auction markets to be graded upon a majority vote of farmers in a referendum, and provides (*a*) that after 30 days notice no tobacco shall be offered for sale at auction on a designated market until it shall have been inspected, (*b*) for suspending the requirements of inspection in certain emergencies, (*c*) that no fees or charges shall be made for inspection on a

designated market, and (*d*) that the Secretary shall not have the right to prevent transactions in tobacco on markets not designated or to close any market.

Section 6 provides for the sampling, inspection, and weighing of tobacco, upon request of the owner or other financially interested person, in cooperation with State or other agencies. This section gives the necessary authority to meet the demand for these services in storage warehouses and other places where tobacco is not sold at auction.

Section 7 provides for appeal inspections and, further, that inspection certificates issued under the act shall be received in all courts and by all officers and employees of the United States as prima facie evidence of the truth of the statements therein contained.

Section 8 requires auction warehousemen to provide a space on tickets or other tags or labels for statement of grade, in a form as the Secretary may prescribe. Section 9 authorizes the establishment of tobacco market news service. Section 10 designates certain acts as being unlawful.

Section 11 authorizes the Secretary to publish the facts regarding any violation of the act. Section 12 provides the penalty for persons found guilty of violating provisions of sections 5 and 10. Section 13 provides that corporations or other firms shall be jointly responsible for the acts of their employees within the scope of their employment. Section 14 authorizes the Secretary to make rules and regulations and to perform other duties he may deem necessary to effectuate the purposes of the act.

Section 15 authorizes the Secretary or employees designated by him to hold hearings, administer oaths, etc., in carrying out work authorized by the act. Section 16 provides that if any provision of the act is held invalid other provisions will not be affected thereby. Section 17 provides that duties under the act may be executed by representatives of the Department of Agriculture designated by the Secretary. Section 18 provides that the act may be cited as "The Tobacco Inspection Act."

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SUPREME COURT OF THE UNITED STATES.

No. 275.—October Term, 1938.

D. T. Currin, S. M. Cutts, and H. A. Averett, doing business as Fleming Warehouse, Oxford, North Carolina, et al., Petitioners,
vs.
Henry A. Wallace, Secretary of Agriculture for the United States, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[January 30, 1939.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Plaintiffs, tobacco warehousemen and auctioneers in Oxford, North Carolina, seek a declaratory judgment[1] that the Tobacco Inspection Act of August 23, 1935,[2] is unconstitutional and an injunction against its enforcement. The Circuit Court of Appeals, reversing the District Court,[3] sustained the validity of the Act and directed the dismissal of the bill of complaint. 95 F. (2d) 856. We granted certiorari. October 10, 1938.

The Act states its scope and purpose. Secs. 1, 2. It applies to transactions involving the sale of tobacco at auction as commonly conducted at auction markets. These transactions are carried on by tobacco producers and by persons engaged in the business of buying and selling tobacco in commerce as defined, that is, in commerce which is interstate or foreign or is with or within the Territories or the District of Columbia.[4] Congress finds that the classification of tobacco according to type, grade, and other characteristics affects the prices received: that "without uniform standards of classification and inspection the evaluation of tobacco is susceptible to speculation, manipulation and control" and "unreasonable fluctuations in prices and quality determinations oc-

[1] Declaratory Judgment Act, 48 Stat. 955.
[2] 49 Stat. 731; 7 U. S. C. Supp. III, 511 a-511 q.
[3] 19 F. Supp. 211.
[4] See Section 1.

cur", constituting a burden upon commerce; and that the use of uniform standards is imperative "for the protection of producers and others engaged in commerce and the public interest therein".

The Secretary of Agriculture is authorized to investigate the handling, inspection and marketing of tobacco and to establish standards by which its type, grade, size, condition, or other characteristics may be determined and these standards are to be the official standards of the United States. Secs. 3, 4.

The Secretary is authorized to designate those markets where tobacco bought and sold at auction or the products customarily manufactured therefrom move in commerce. He is not to designate a market unless two-thirds of the growers, voting at a prescribed referendum, favor it. The Act provides that after public notice that a market has been so designated, no tobacco shall be offered for sale at auction thereon until it has been inspected and certified by an authorized representative of the Secretary according to the established standards. There is a proviso that in case competent inspectors are not available or for other reasons the Secretary is unable to provide for such inspection and certification at all auction markets within a type area, he shall first designate those markets where the greatest number of growers may be served with the facilities available. Sec. 5.

Warehousemen must provide space on warehouse tickets or other tags or labels used by them for showing the grades as determined by an authorized inspector. Sec. 8. The Secretary is authorized to publish and distribute, without cost to the grower, timely information on the "market supply and demand, location, disposition, quality, condition, and marketing prices". Sec. 9. Violation of the requirement of inspection and certification at designated markets, is made a misdemeanor punishable by a fine of not more than $1000 or imprisonment for not more than one year or both. Sec. 12.

The market practices which led to this enactment are disclosed by the record. They are described at length in the Report of the Committee on Agriculture of the House of Representatives on the submission of the bill.[5] The growers sort their tobacco for market as best they can. It is tied in bundles or "hands" and brought to the auction warehouse where it is put in baskets, weighed, and

[5] Report, Committee of Agriculture, June 5, 1935, to accompany H. R. 8026.

placed in rows on the warehouse floor with a ticket on each pile. The warehousemen auction the tobacco, acting as representatives of the growers and receiving fees at rates fixed by the state law. The auction goes forward with extreme rapidity—about one basket every ten seconds—the auctioneer proceeding along one side of a row and the buyers moving with him. The auction is conducted with a technical vocabulary intelligible only to the initiated, bids being made by well-understood gestures. The sale is not completed until the grower accepts the bid; he may decline the bid and take his tobacco away. The bidders are representatives of tobacco companies and speculators who are experts in grades.[6] The Committee reported that "The possession of grade and price information by the buyers and the lack of it on the part of the growers, places the growers under a severe handicap in the marketing of their tobacco and opens the way to abuses and practices by which farmers are victimized. . . . It is the thought of the committee that if the purchaser needs an expert in grades in order to protect his interest in the sale, the growers should be accorded the same protection". It also appears from the record that because of the speed of the sale few buyers have the opportunity to make a satisfactory examination of the tobacco and consequently many errors are made, although on the average the buyers are not supposed to suffer seriously. The effect of the methods used is to introduce an unusual degree of uncertainty in the prices which a grower may receive for tobacco of any particular grade.

Under the operation of the Act federal inspectors examine the tobacco about an hour before the sale. They pull samples from each pile and place tickets indicating the grade. Each day there is displayed in the warehouse a report indicating the average price for the government grades sold on the previous day, and weekly reports are issued for the preceding week.

The Secretary promulgated regulations to be effective January 2, 1936. Later, official standard grades for flue-cured tobacco were prescribed. The Secretary designated twenty-three markets throughout the country for compulsory inspection and grading. In North Carolina tobacco was marketed on forty auction markets. Three of these, at Oxford, Goldsboro, and Farmville, were desig-

[6] The methods are similar to those followed in Georgia as described in Townsend v. Yeomans, 301 U. S. 441, 445.

nated.[7] In view of the lack of expertly trained inspectors and graders, all markets in North Carolina could not be designated and defendants say that the markets above named were selected because in previous years the Department had established at these places voluntary inspection of tobacco under the Farm Products Inspection Act[8] and the growers were familiar with the benefits accruing from the federal action.

In relation to Oxford, the market here in question, the required referendum was had. Upwards of 8600 ballots were distributed to growers who had sold on that market during the previous season; 1896 ballots were returned, of which 1782 were in favor of the designation. There were 248 other ballots returned, of which 96 per cent were favorable.

Plaintiffs contend (1) that the transaction of offering tobacco for sale at auction on the warehouse floor is not a transaction in interstate commerce and hence is not subject to congressional regulation; (2) that the Act is invalid because of its discriminatory character; (3) that the Act provides for an unconstitutional delegation of legislative power, and (4) that the Act violates the due process clause of the Fifth Amendment.

The Circuit Court of Appeals found, and the record supports the finding, that there is an actual controversy between plaintiffs and defendants, entitling plaintiffs to invoke the Declaratory Judgment Act. See *Aetna Life Insurance Company* v. *Haworth*, 300 U. S. 227, 240, 241.

First.—Plaintiffs urge that tobacco "is not inherently an interstate commodity"; that the auction transaction is not a sale as title is not passed until the grower accepts the price; that after the auction the grower may, and often does, reject the bid and he may take his tobacco away; that the inspection required by the Act is done prior to the offering for sale; and that until sale and delivery to the purchaser the tobacco is not in interstate commerce and its control is reserved to the State. These objections are untenable. The record shows that the sales consummated on the Oxford auction market are predominantly sales in interstate and foreign commerce. The principal purchasers are few in number and in the main are engaged in the export trade or in the manu-

[7] A referendum was also had at Smithfield which resulted unfavorably.
[8] 7 U. S. C. 492.

facture of tobacco products in other States. It appears that in a given week, shortly before the beginning of this suit, approximately 2,000,000 pounds of tobacco were sold on the Oxford market, only 15.3 per cent. of which were definitely destined for manufacture in North Carolina. About 14 per cent. were in part for manufacture in North Carolina and in part for other States, and about 62 per cent. moved directly into foreign commerce. The fact that the growers are not bound to accept bids, and in certain instances reject them, does not remove the auction from its immediate relation to the sales that are consummated upon the offers that the growers do accept. The auction in such cases is manifestly a part of the transaction of sale. So far as the sales are for shipment to other States or to foreign countries, it is idle to contend that they are not sales in interstate or foreign commerce and subject to congressional regulation. Where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation. *Swift & Co.* v. *United States*, 196 U. S. 375, 398, 399; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 290, 291; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 54; *Stafford* v. *Wallace*, 258 U. S. 495, 519; *Flanagan* v. *Federal Coal Co.*, 267 U. S. 222, 225; *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189, 198; *Foster Packing Co.* v. *Haydel*, 278 U. S. 1, 10.

There is no permissible constitutional theory which would apply this principle to purchases of livestock as in the *Swift* and *Stafford* cases, and of grain as in the *Lemke* and *Shafer* cases, and deny its application to tobacco. In the *Lemke* case (*supra*, at pp. 60, 61), condemning the effort of a State to control the buying of grain for shipment to other States, the Court referred to the power of Congress to provide its own regulation for such transactions, saying: "It is alleged that such legislation is in the interest of the grain growers and essential to protect them from fraudulent purchases, and to secure payment to them of fair prices for the grain actually sold. This may be true, but Congress is amply authorized to pass measures to protect interstate commerce if legislation of that character is needed". And again, in the *Shafer* case (*supra*, at pp. 198, 199), the Court said: "The right to buy it [grain] for shipment, and to ship it in interstate commerce is not a privilege derived from state laws and which they may fetter with conditions, but is a common right, the regulation of which is committed

to Congress and denied to the States by the commerce clause of the Constitution".

The fact that intrastate and interstate transactions are commingled on the tobacco market does not frustrate or restrict the congressional power to protect and control what is committed to its own care. As we said in the *Shreveport* case, 234 U. S. 342, 351, 352, with respect to the intrastate rates of interstate carriers—"Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field". See, also, *Minnesota Rate Cases*, 230 U. S. 352, 399; *Wisconsin Railroad Commission* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 588; *Stafford* v. *Wallace, supra*, at p. 522. Here, the transactions on the tobacco market were conducted indiscriminately at virtually the same time, and in a manner which made it necessary, if the congressional rule were to be applied, to make it govern all the tobacco thus offered for sale.

Having this authority to regulate the sales on the tobacco market, Congress could prescribe the conditions under which the sales should be made in order to give protection to sellers or purchasers or both. Congress is not to be denied the exercise of its constitutional authority in prescribing regulations merely because these may have the quality of police regulations. It is on that principle that misbranding under the Food and Drugs Act[9] embraces false or misleading statements as to the ingredients of commodities or the effects of their use. See *Seven Cases* v. *United States*, 239 U. S. 510. Inspection and the establishment of standards for commodities has been regarded from colonial days as appropriate to the regulation of trade, and the authority of the States to enact inspection laws is recognized by the Constitution. Art. I, sec. 10, par. 2. See *Turner* v. *Maryland*, 107 U. S. 39, 51-54; *Pacific States Company* v. *White*, 296 U. S. 176, 181. But the inspection laws of a State relating to exports or to articles purchased for shipment to other States are subject to the paramount regulatory power of Congress. *Turner* v. *Maryland, supra*, at pp. 57, 58. And Con-

[9] 21 U. S. C. 10.

gress has long exercised this authority in enacting laws for inspection and the establishment of standards in relation to various commodities involved in transactions in interstate or foreign commerce.[10] The fact that the inspection and grading of the tobacco take place before the auction does not dissociate the former from the latter, but on the contrary it is obvious that the inspection and grading have immediate relation to the sales in interstate and foreign commerce which Congress thus undertakes to govern.

In *Townsend* v. *Yeomans*, 301 U. S. 441, we recently had under consideration the legislation of Georgia prescribing maximum charges for the services of tobacco warehousemen who conducted their business in a manner similar to that prevailing in North Carolina. There, the warehousemen strongly insisted that they were engaged in interstate and foreign commerce, as the tobacco sold on their floors was destined for interstate or foreign shipment, and hence that the State was without power to fix their fees. They invoked the federal Act in support of their contention. But we found nothing in the federal Act which undertook to regulate the charges of warehousemen and hence we concluded that Congress had restricted its requirements and left the State free to deal with the matters not covered by the federal legislation and not inconsistent therewith. The authority of Congress to enact the Tobacco Inspection Act was not questioned.

Second.—Plaintiffs complain that the Act is discriminatory. They say that warehousemen on other tobacco markets in North Carolina, doing the same sort of business and competing for patronage among the same growers, are at liberty to conduct sales in their warehouses without inspection and certification.

The reason for the selection is shown. The lack of a sufficient number of expert inspectors made it impracticable to supply inspection and grading at all tobacco auction markets. Having this practical difficulty in mind, Congress directed that when for that reason or others the Secretary was unable to provide for inspection and certification at all such markets within a type area, he should first designate those where the greatest number of growers may be

[10] See, e. g., United States Cotton Standards Act, 7 U. S. C. 51-65; Food and Drugs Act, 21 U. S. C. 14a, 15, 20, 41, 71, 74, 89, 143; United States Warehouse Act, 7 U. S. C. 243; Certification of condition, etc. of agricultural products shipped in interstate commerce, 7 U. S. C. 414; Farm Products Inspection Act, 7 U. S. C. 492; Perishable Agricultural Commodities Act, 7 U. S. C. 499n.

served with the facilities that are available. Sec. 5. We do not doubt that such a selection was within the congressional power.

We have repeatedly said that the power given to Congress to regulate interstate and foreign commerce is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution". *Gibbons* v. *Ogden*, 9 Wheat. 1, 196. To hold that Congress in establishing its regulation is restricted to the making of uniform rules would be to impose a limitation which the Constitution does not prescribe. There is no requirement of uniformity in connection with the commerce power (Art. I, sec. 8, par. 3) such as there is with respect to the power to lay duties, imposts and excises (Art. I. sec. 8, par. 1). *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311, 327. Undoubtedly, the exercise of the commerce power is subject to the Fifth Amendment (*Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336; *United States* v. *Cress*, 243 U. S. 316, 328; *Louisville Bank* v. *Radford*, 295 U. S. 555, 589); but that Amendment, unlike the Fourteenth, has no equal protection clause. *La Belle Iron Works* v. *United States*, 256 U. S. 377, 392; *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 584.

If it be assumed that there might be discrimination of such an injurious character as to bring into operation the due process clause of the Fifth Amendment, that is a different matter from a contention that mere lack of uniformity in the exercise of the commerce power renders the action of Congress invalid. For that contention we find no warrant. It is of the essence of the plenary power conferred that Congress may exercise its discretion in the use of the power. Congress may choose the commodities and places to which its regulation shall apply. Congress may consider and weigh relative situations and needs. Congress is not restricted by any technical requirement but may make limited applications and resort to tests so that it may have the benefit of experience in deciding upon the continuance or extension of a policy which under the Constitution it is free to adopt. As to such choices, the question is one of wisdom and not of power.

Third.—The argument that there is an unconstitutional delegation of legislative power is equally untenable. This is not a case where Congress has attempted to abdicate, or to transfer to others, the essential legislative functions with which it is vested by the

Constitution. Art. I, sec. 1; sec. 8, par. 18. See *Panama Refining Co. v. Ryan*, 293 U. S. 388, 421; *Schechter Corporation v. United States*, 295 U. S. 529, 541, 542, 553. We have always recognized that legislation must often be adapted to conditions involving details with which it is impracticable for the legislature to deal directly. We have said that—"The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility". *Panama Refining Co. v. Ryan, supra.* In such cases "a general provision may be made, and power given to those who are to act under such general provisions to fill up the details". *Wayman v. Southard*, 10 Wheat. 1, 43. We think that the Tobacco Inspection Act belongs to that class.

So far as growers of tobacco are concerned, the required referendum does not involve any delegation of legislative authority. Congress has merely placed a restriction upon its own regulation by withholding its operation as to a given market "unless two-thirds of the growers voting favor it". Similar conditions are frequently found in police regulations. *Cusack Company v. City of Chicago*, 242 U. S. 526, 530. This is not a case where a group of producers may make the law and force it upon a minority (see *Carter v. Carter Coal Co.*, 298 U. S. 310, 318) or where a prohibition of an inoffensive and legitimate use of property is imposed not by the legislature but by other property owners (see *Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U. S. 116, 122). Here it is Congress that exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required favorable vote upon the referendum is one of these conditions. The distinction was pointed out in *Hampton & Company v. United States*, 276 U. S. 394, 407, where, in sustaining the so-called "flexible tariff provision" of the Act of September 21, 1922,[11]

[11] 42 Stat. 858, 941, 942.

and the authority it conferred upon the President, we said: "Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an Executive, or, as often happens in matters of state legislation, it may be left to a popular vote of the residents of a district to be effected by the legislation. While in a sense one may say that such residents are exercising legislative power, it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution, the condition of its legislation going into effect being made dependent by the legislature on the expression of the voters of a certain district".

Nor is there an unconstitutional delegation to the Secretary of Agriculture. Congress has set forth its policy for the establishment of standards for tobacco according to type, grade, size, condition, and other determinable characteristics. Secs. 3, 4. The provision that the Secretary shall make the necessary investigations to that end and fix the standards according to kind and quality is plainly appropriate and conforms to familiar legislative practice as shown by the various statutes already mentioned.[12] It is not different in principle from the authority conferred upon the Secretary of the Treasury to establish "uniform standards of purity, quality and fitness for consumption of all kinds of teas imported into the United States" (*Buttfield* v. *Stranahan*, 192 U. S. 470, 494), or from that conferred upon the Interstate Commerce Commission to fix standards for safety devices and equipment (*St. Louis & Iron Mountain R. Co.* v. *Taylor*, 210 U. S. 281, 286, 287; *Napier* v. *Atlantic Coast Line*, 272 U. S. 605, 612), or from that conferred upon the Secretary of War to determine whether bridges and other structures constitute unreasonable obstructions to navigation and to specify and prescribe the structural changes that are required (*Union Bridge Co.* v. *United States*, 204 U. S. 364).

The Secretary of Agriculture is authorized to designate those markets where tobacco bought and sold thereon at auction moves in commerce. Sec. 5. This calls for the ascertainment of a fact. The intention of Congress is clear that markets thus ascertained shall be designated subject to the prescribed conditions and as rapidly

12 See Note 10.

as facilities for inspection are available. We find no unfettered discretion lodged with the administrative officer. The requirement of a referendum, as already noted, calls for the expression of the wishes of the growers and the Secretary acts merely as an administrative agent in conducting the referendum. The provision for the suspension of a designated market because competent inspectors are not available or the quantity of tobacco is not enough to justify the cost of the service, sets forth definite as well as reasonable criteria. The statute also lays down a practical rule for the guidance of the Secretary in the selection of markets in the event that because of lack of inspectors or other reasons the Secretary is unable to furnish inspection and certification at all auction markets within a type area. In that case he is first to designate those auction markets "where the greatest number of growers may be served with the facilities available to him".

The statute thus defines the policy of Congress and establishes standards within the framework of which the administrative agent is to supply the details. The provisions of the Act are well within the principle of permissible delegation which we applied in relation to the administration of the forest reserve in *United States* v. *Grimaud*, 220 U. S. 506, 517; to the allocation of licenses, wave lengths, etc. in *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 285; and to the exercise of the powers conferred upon the Interstate Commerce Commission in *New York Central Securities Corporation* v. *United States*, 287 U. S. 12, 24.

Nor does it appear that, in his use of his authority in the instant case, the Secretary has acted in an arbitrary and capricious manner. As he did not have an adequate corps of experts to supply all the North Carolina markets, he selected those where there had been voluntary inspection under the prior Act.[13] It cannot be said that this was an unreasonable course.

Fourth.—Finally, plaintiffs invoke the due process clause of the Fifth Amendment. Plaintiffs are warehousemen and auctioneers acting as agents for the growers who own the tobacco and pay their commissions. Plaintiffs are thus in the position of contesting a regulation for the benefit of their principals because of an alleged interference with their business. The Act does not affect their rate of charges and does not deprive them of any property.

[13] Farm Products Inspection Act, 7 U. S. C. 492.

The growers, to be sure, may take their tobacco where they please. But even if it were assumed that the contention that the markets subject to the inspection provision would lose patronage could afford ground for resisting this sort of regulation, otherwise valid, the claim in this instance rests more on conjecture than on proof. We agree with the Circuit Court of Appeals that as to the asserted difference of prices obtainable on inspected markets, as compared with those not inspected, the evidence has little probative value and that the loss of business from growers who do not desire the inspection would seem by the record to be more than counterbalanced by the gain of business from those who desire it. 95 F. (2d) p. 861.

The decree of the Circuit Court of Appeals is affirmed.

Affirmed.

Mr. Justice McREYNOLDS and Mr. Justice BUTLER dissent.

A true copy.

Test:

Clerk, Supreme Court, U. S.